him was his sister, Miss Sue Pinckney, whom he loved and worshipped with a constancy as rare as it was beautiful. Between them had existed a devotion for which the language of poets, the canvas of artists, the marble of sculptors have no adequate expression. For more than half a century they had walked hand in hand through shadow and through light. Hardly a day had ever passed that they did not communicate in some way. As he embraced her on this supreme occasion the clamor immediately ceased and the great throngs in reverent silence observed this expression of as pure a love, a loyalty as sublime, as ever flowered in the human heart. Of his sister he once said:

I owe more to her than can ever be expressed, and the ambition of my life is so to live that I will be worthy of her affection.

It was when he assumed his seat in Congress that I made his acquaintance. We were drawn together by the fact that we were, respectively, the youngest and oldest Members of the Texas delegation. From acquaintance to friendship, from friendship to affection, were but short and eager steps. Our association here was most intimate. I had thorough opportunity to observe him in every phase and mood of life, and admiration rivaled love. He gave the closest and most conscientious attention to the proceedings of the House. He would remain in his seat through the tedious deliberations on long appropriation bills, evincing the liveliest interest in every motion and in every debate. When death retired him he was rapidly taking a high place among the most conservative and useful Members of this body. Of the civil war he frequently spoke. Of his record as a Confederate soldier he was justly proud. He accepted, however, the logic of Appomattox. He gloried in a reunited country and a common flag. He believed with Jefferson Davis that on the arch of the Union should be written, "Esto perpetua"—be thou perpetual.

The significance of his life lies in the fact that he was a typical Confederate soldier. Earth has no higher title. As I heard from his laconic lips the story of that giant strife I saw the hosts in battle line. I saw the thinning rank through four tempestuous years yield slowly to superior force. I heard the thundrous prelude of Manassas. I saw the fires of Carthage, Lexington, Columbus, and Ball's Bluff. I saw the surge of Shiloh's thousands, the clash of the legions at Murfreesboro. I saw the crimson skies of Malvern Hill, of Antietam, and of Fredericksburg. I saw the carnage of Chickamauga and Missionary Ridge. I heard the crash of Jackson's columns against the opposing myriads at Chancellorsville. I saw the charge at Gettysburg. I saw the gleam of a million bayonets encircle the tattered groups of gray. In the gloom of the Wilderness I saw them approach the superbest martyrdom since Calvary's agonies made all defeat and sorrow holy. And when the tumult of the conflict fell there rose above the ashes of Southern hopes and homes a cross that bore the figure of a Confederate soldier. Beyond the waste of nineteen hundred years I saw that other cross on which a God had died; and I knew that through my tears I saw the two sublimest sacrifices of God for man, and man for his conception of the truth.

Sleep, warrior, sleep. Your unimprisoned soul now mingles with the armies in the tents of light, where blue and gray together welcome every comrade to the rank immortal, armies summoned to the peace of endless morning by reveilles from the lips of God—enemies no more, but brothers there and their united children brothers here, forever and forever.

[Mr. RANDELL of Texas addressed the House. See Appendix.]

And then, in pursuance of the resolution heretofore adopted, the House (at 12 o'clock and 47 minutes p. m.) adjourned.

SENATE.

MONDAY, *April 30, 1906.*

Prayer by the Chaplain, Rev. EDWARD E. HALE.

The Secretary proceeded to read the Journal of the proceedings of Saturday last, when, on request of Mr. HALE, and by unanimous consent, the further reading was dispensed with.

The VICE-PRESIDENT. The Journal stands approved.

FINDINGS OF THE COURT OF CLAIMS.

The VICE-PRESIDENT laid before the Senate a communication from the assistant clerk of the Court of Claims, transmitting a certified copy of the findings of fact filed by the court in the cause of Phoebe N. Ver Neulen, widow of Edmund C. Ver Neulen, deceased, *v.* The United States; which, with the accompanying paper, was referred to the Committee on Claims, and ordered to be printed.

MESSAGE FROM THE HOUSE.

A message from the House of Representatives, by Mr. W. J. BROWNING, its Chief Clerk, transmitted to the Senate resolutions of the House commemorative of the life and public services of Hon. JOHN M. PINCKNEY, late a Representative from the State of Texas.

ENROLLED BILLS SIGNED.

The message also announced that the Speaker of the House had signed the following enrolled bills; and they were thereupon signed by the Vice-President:

S. 47. An act to create a board for the condemnation of insanitary buildings in the District of Columbia, and for other purposes;

S. 956. An act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska;

S. 3045. An act to incorporate the American Cross of Honor within the District of Columbia;

S. 4046. An act to incorporate the Edes Home;

H. R. 11037. An act relating to the transportation of dutiable merchandise without appraisement;

H. R. 11946. An act to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes;" and

H. R. 15911. An act to amend the laws of the United States relating to the registration of trade-marks.

PETITIONS AND MEMORIALS.

Mr. GALLINGER presented the petition of Thomas S. Watkins, post commander, Department of the Potomac, Grand Army of the Republic, of Washington, D. C., praying that an appropriation of $5,000 be made for the marking of historical places in the District of Columbia; which was referred to the Committee on Appropriations.

He also presented petitions of members of the Metropolitan police department of Washington, D. C., the police department of New York City, N. Y., and of the police department of Baltimore, Md., praying for the enactment of legislation to increase the wages of patrol drivers of the Metropolitan police force of the District of Columbia; which were referred to the Committee on Appropriations.

He also presented a petition of the Department of the Potomac, Grand Army of the Republic, of Washington, D. C., praying for the enactment of legislation providing for the purchase of a temporary home in the District of Columbia for ex soldiers and sailors of the late wars; which was referred to the Committee on the District of Columbia.

He also presented a petition of sundry citizens of Washington, D. C., and the petition of George W. Evans, of Washington, D. C., praying that an appropriation of $8,400 be made for replacing granite block pavement with asphalt on Nineteenth street between I and L streets NW., in that city; which were referred to the Committee on Appropriations.

Mr. PLATT presented a petition of Local Council No. 50, Junior Order United American Mechanics, of Buffalo, N. Y., praying for the enactment of legislation to restrict immigration; which was referred to the Committee on Immigration.

He also presented petitions of the Kemp & Burpee Manufacturing Company, of Syracuse; of the Warsaw-Wilkinson Company, of Warsaw; of Local Union No. 415, Brotherhood of Painters, Decorators, and Paper Hangers of America, of Olean, and of Local Union No. 34, Brotherhood of Painters, Decorators and Paper Hangers of America, of Buffalo, all in the State of New York, praying for the removal of the internal-revenue tax on denaturized alcohol; which were referred to the Committee on Finance.

Mr. HALE presented petitions of the Maine State Grange, Patrons of Husbandry; of Coopers Mills Grange, Patrons of Husbandry; of the New Century Grange, Patrons of Husbandry, of Dedham, and of sundry citizens of Waldo County, all in the State of Maine, praying for the removal of the internal-revenue tax on denaturized alcohol; which were referred to the Committee on Finance.

Mr. BURNHAM presented the memorial of E. W. Poore, of Manchester, N. H., remonstrating against the enactment of legislation to remove the duty on denaturized alcohol; which was referred to the Committee on Finance.

He also presented the petition of Dr. F. M. Boyle, of Valdez, Territory of Alaska, praying for the enactment of legislation to regulate the practice of medicine in that Territory; which was ordered to lie on the table.

He also presented the petition of Herman G. Morrison, of Laconia, N. H., praying for the enactment of legislation to re-

move the duty on denaturized alcohol; which was referred to the Committee on Finance.

Mr. ANKENY (for Mr. GAMBLE) presented the petition of Marvid Carlson and sundry other citizens of Centerville, S. Dak., praying for the enactment of legislation to remove the duty on denaturized alcohol; which was referred to the Committee on Finance.

Mr. PILES presented a petition of sundry citizens of St. Helen, Wash., and the petition of Ernest Aschau and sundry other citizens of St. Helen, Wash., praying for the enactment of legislation to remove the duty on denaturized alcohol; which were referred to the Committee on Finance.

Mr. KITTREDGE presented a petition of the Western South Dakota Stock Growers' Association, praying for the enactment of legislation to extend the time in the interstate transportation of live stock; which was ordered to lie on the table.

He also presented a petition of the Western South Dakota Stock Growers' Association, praying for the enactment of legislation providing for the segregation of agricultural from grazing land, and to provide a system of leasing said lands; which was referred to the Committee on Public Lands.

Mr. KEAN presented a memorial of sundry citizens of Elizabeth, N. J., remonstrating against the enactment of legislation placing the schools of Alaska under the supervision of the governor of that Territory; which was referred to the Committee on Territories.

He also presented sundry petitions of citizens of Newark, N. J., praying for the adoption of an amendment to the Constitution to prohibit polygamy; which were referred to the Committee on the Judiciary.

Mr. BURKETT presented a memorial of the Credit Men's Association of Lincoln, Nebr., remonstrating against the repeal of the present national bankruptcy law; which was referred to the Committee on the Judiciary.

Mr. FULTON presented a petition of sundry citizens of Weston, Oreg., praying for the enactment of legislation providing for the closing on Sunday of the Jamestown Exposition; which was referred to the Select Committee on Industrial Expositions.

Mr. OVERMAN presented a statement and affidavits in support of the bill (S. 4602) for the relief of the Methodist Episcopal Church South, at Beaufort, Carteret County, N. C.; which were referred to the Committee on Claims.

He also presented sundry papers to accompany the bill (S. 5937) for the relief of Leonidos H. Hall; which were referred to the Committee on Claims.

Mr. CULLOM presented a petition of Local Division No. 155, Brotherhood of Locomotive Engineers, of Decatur, Ill., praying for the passage of the so-called "employers' liability bill;" which was referred to the Committee on Interstate Commerce.

Mr. RAYNER presented a petition of Local Union No. 1, Brotherhood of Painters, Decorators, and Paper Hangers, of Baltimore, Md., praying for the enactment of legislation to remove the duty on denaturized alcohol; which was referred to the Committee on Finance.

Mr. PENROSE presented a petition of the Presbyterian Ministerial Association of Philadelphia, Pa., praying for the enactment of legislation to prohibit the sale of intoxicating liquors in all Government buildings and grounds; which was referred to the Committee on Public Buildings and Grounds.

He also presented a memorial of the Universal Peace Union of Philadelphia, Pa., remonstrating against the enactment of legislation appropriating money for the purpose of increasing the Army and Navy, the enrollment of a general militia, and for erecting additional coast fortifications; which was referred to the Committee on Naval Affairs.

He also presented a petition of Heilman Council, No. 140, Daughters of Liberty, of Falls of Schuylkill, Pa., and a petition of Springtown Council, No. 929, Daughters of Liberty, of Springtown, Pa., praying for the enactment of legislation to restrict immigration; which were referred to the Committee on Immigration.

He also presented memorials of Local Division No. 169, Amalgamated Association of Street and Electric Railway Employees of America, of Easton, Pa., and of Local Division No. 173, Amalgamated Association of Street and Electric Railway Employees of America, of Hazleton, Pa., remonstrating against the repeal of the present Chinese-exclusion law; which were referred to the Committee on Immigration.

Mr. FRYE presented a petition of 66 citizens of Portland, Me., praying for the removal of the internal-revenue tax on denaturized alcohol; which was referred to the Committee on Finance.

Mr. HOPKINS presented memorials of sundry citizens of Chicago, Ill., remonstrating against the ratification of the Isle of Pines treaty; which were ordered to lie on the table.

He also presented the petition of E. J. Goodall, of Chicago, Ill., praying for the adoption of amendments to the postal laws; which was referred to the Committee on Post-Offices and Post-Roads.

He also presented petitions of sundry citizens of Aurora and Enfield, Ill.; of Detroit and Saginaw, Mich.; of Dayton, Ky., and of Pittsburg, Kans., praying for the enactment of legislation granting pensions to the children of deceased soldiers and sailors; which were referred to the Committee on Pensions.

He also presented petitions of sundry citizens of Batavia, Chicago, North Aurora, Decatur, Elburn, Sheffield, Hardinville, Gossett, Pekin, Moline, and Peoria, all in the State of Illinois, and of St. Louis, Mo., praying for the removal of the internal-revenue tax on denaturized alcohol; which were referred to the Committee on Finance.

NAVAL AND POSTAL EMERGENCIES IN CALIFORNIA.

Mr. HALE. From the Committee on Appropriations I report back without amendment the bill (H. R. 18709) making additional appropriations for the public service on account of earthquake and attending conflagration on the Pacific coast, and I ask for its present consideration.

The Secretary read the bill; and there being no objection, the Senate, as in Committee of the Whole, proceeded to its consideration. It proposes to appropriate $100,000 to enable the Secretary of the Navy to employ such additional laborers and mechanics as may, in his judgment, be necessary for immediate service under the Bureau of Steam Engineering in the navy-yard at Mare Island, Cal., to remain available until June 30, 1906, and to appropriate $70,000 to enable the Postmaster-General, in his discretion, to meet emergencies in the postal service in the State of California occasioned by earthquake and fire, to be paid out of the revenues of the postal service and to remain available until June 30, 1906.

The bill was reported to the Senate without amendment, ordered to a third reading, read the third time, and passed.

REPORTS OF COMMITTEES.

Mr. SMOOT, from the Committee on Pensions, to whom were referred the following bills, reported them each with an amendment, and submitted reports thereon:

A bill (S. 5803) granting an increase of pension to William H. Meadows;

A bill (S. 5806) granting an increase of pension to Joseph D. Armstrong;

A bill (S. 5758) granting an increase of pension to Joshua J. Clark; and

A bill (S. 3750) granting an increase of pension to Wilbur F. Flint.

Mr. SMOOT, from the Committee on Pensions, to whom was referred the bill (S. 5085) granting an increase of pension to Ellen Donovan, reported it with amendments, and submitted a report thereon.

He also, from the same committee, to whom were referred the following bills, reported them severally without amendment, and submitted reports thereon:

A bill (H. R. 14142) granting an increase of pension to James A. Scrutchfield;

A bill (H. R. 14980) granting an increase of pension to Matthew H. Bellomy;

A bill (H. R. 15201) granting an increase of pension to Edward O'Shea;

A bill (H. R. 15588) granting a pension to Hester Hyatt;

A bill (H. R. 15632) granting an increase of pension to Joseph B. Sanders;

A bill (H. R. 15675) granting an increase of pension to Harley Mowrey;

A bill (H. R. 15682) granting an increase of pension to Hannah M. Hayes;

A bill (H. R. 15807) granting a pension to Catharine Arnold;

A bill (H. R. 16372) granting an increase of pension to Andrew Dorn;

A bill (H. R. 16724) granting an increase of pension to James S. Burgess; and

A bill (H. R. 16902) granting an increase of pension to Dennis Winn.

Mr. ALGER, from the Committee on Pensions, to whom was referred the bill (S. 5046) granting a pension to George Amerine, reported it without amendment, and submitted a report thereon.

He also, from the same committee, to whom were referred the following bills, reported them severally with amendments, and submitted reports thereon:

A bill (S. 1855) granting an increase of pension to J. J. Brown; and

A bill (S. 5731) granting an increase of pension to James McTwiggin.

Mr. ALGER, from the Committee on Pensions, to whom were referred the following bills, reported them each with an amendment, and submitted reports thereon:

A bill (S. 5158) granting an increase of pension to Andrew J. Fosdick; and

A bill (S. 1224) granting an increase of pension to William A. Bowles.

Mr. McCUMBER, from the Committee on Pensions, to whom were referred the following bills, reported them severally with amendments, and submitted reports thereon:

A bill (S. 4458) granting an increase of pension to Andrea P. Quist;

A bill (S. 5557) granting a pension to Henry C. Sloan; and

A bill (S. 764) granting an increase of pension to Robert Carney.

Mr. McCUMBER, from the Committee on Pensions, to whom were referred the following bills, reported them each with an amendment, and submitted reports thereon:

A bill (S. 5143) granting an increase of pension to Eugene V. McKnight;

A bill (S. 4784) granting an increase of pension to Lemuel Cross;

A bill (S. 2791) granting an increase of pension to John Lindt;

A bill (S. 4770) granting an increase of pension to Edward Hart; and

A bill (S. 668) granting an increase of pension to John C. Rassbach.

Mr. McCUMBER, from the Committee on Pensions, to whom were referred the following bills, reported them severally without amendment, and submitted reports thereon:

A bill (S. 5809) granting an increase of pension to Hannah C. Church; and

A bill (S. 1849) granting an increase of pension to David T. Pettie.

Mr. McCUMBER (for Mr. PATTERSON), from the Committee on Pensions, to whom were referred the following bills, reported them severally without amendment, and submitted reports thereon:

A bill (H. R. 15149) granting an increase of pension to William W. Ferguson; and

A bill (H. R. 15855) granting a pension to Will E. Kayser.

Mr. BURNHAM, from the Committee on Pensions, to whom were referred the following bills, reported them each with an amendment and submitted reports thereon:

A bill (S. 2852) granting a pension to Bridget Manahan;

A bill (S. 4983) granting an increase of pension to John M. Farquhar;

A bill (S. 911) granting an increase of pension to Julius A. Davis; and

A bill (S. 1264) granting an increase of pension to Joseph Shiney.

Mr. BURNHAM, from the Committee on Pensions, to whom was referred the bill (S. 5834) granting an increase of pension to Charles F. Sheldon, reported it without amendment, and submitted a report thereon.

Mr. PILES, from the Committee on Pensions, to whom were referred the following bills, reported them each with an amendment, and submitted reports thereon:

A bill (S. 5583.) granting an increase of pension to Foster L. Banister;

A bill (S. 2294) granting a pension to Michael Reynolds;

A bill (S. 3904) granting an increase of pension to George J. Thomas;

A bill (S. 5784) granting an increase of pension to Mahala F. Campbell; and

A bill (S. 5785) granting an increase of pension to Joseph W. Doughty.

Mr. PILES, from the Committee on Pensions, to whom were referred the following bills, reported them severally without amendment, and submitted reports thereon:

A bill (S. 5501) granting an increase of pension to Jacob L. Kline;

A bill (S. 4497) granting an increase of pension to Augustus McDowell; and

A bill (H. R. 9812) granting an increase of pension to Joseph B. Newbury.

Mr. LA FOLLETTE, from the Committee on Pensions, to whom were referred the following bills, reported them severally without amendment, and submitted reports thereon:

A bill (H. R. 11466) granting an increase of pension to Benjamin F. Heald;

A bill (H. R. 12331) granting an increase of pension to Daniel J. Miller;

A bill (H. R. 15064) granting an increase of pension to Jacob Wagenknecht;

A bill (H. R. 15272) granting an increase of pension to Patrick Mooney;

A bill (H. R. 15783) granting an increase of pension to George W. Sutton;

A bill (H. R. 16098) granting an increase of pension to Frederick Fenz;

A bill (H. R. 16220) granting an increase of pension to George C. Powell;

A bill (H. R. 16522) granting an increase of pension to Charles Meyer;

A bill (H. R. 16632) granting an increase of pension to Louis Lepine;

A bill (H. R. 16884) granting an increase of pension to William D. Woodcock;

A bill (H. R. 3227) granting an increase of pension to Isaac Tuttle;

A bill (H. R. 4222) granting a pension to Otto Boesewetter;

A bill (H. R. 4743) granting an increase of pension to Hiram N. Goodell;

A bill (H. R. 4745) granting an increase of pension to Henry D. Stiehl;

A bill (H. R. 6490) granting an increase of pension to William H. Gilbert;

A bill (H. R. 6912) granting an increase of pension to Charles H. Weaver;

A bill (H. R. 7419) granting an increase of pension to James Scott;

A bill (H. R. 7495) granting a pension to Susie M. Gerth;

A bill (H. R. 7498) granting an increase of pension to Mary Hanson;

A bill (H. R. 7500) granting an increase of pension to John McCandless;

A bill (H. R. 7876) granting an increase of pension to Julius Beier;

A bill (H. R. 8138) granting an increase of pension to Similde E. Forbes;

A bill (H. R. 8144) granting a pension to Ada J. Lasswell;

A bill (H. R. 8662) granting an increase of pension to Edward P. Paramore;

A bill (H. R. 12194) granting a pension to Minnie Irwin;

A bill (H. R. 13861) granting an increase of pension to Wilhelm Dickhoff; and

A bill (H. R. 15002) granting an increase of pension to George E. Wood.

Mr. LA FOLLETTE, from the Committee on Pensions, to whom was referred the bill (H. R. 13787) granting an increase of pension to Malcolm Ray, reported it with an amendment, and submitted a report thereon.

Mr. BURKETT, from the Committee on Pensions, to whom were referred the following bills, reported them each with an amendment, and submitted reports thereon:

A bill (S. 3684) granting an increase of pension to George W. Hyde;

A bill (S. 5871) granting an increase of pension to William B. Ashton; and

A bill (S. 2429) granting an increase of pension to James Devor.

Mr. BURKETT, from the Committee on Pensions, to whom were referred the following bills, reported them severally without amendment, and submitted reports thereon:

A bill (S. 2619) granting an increase of pension to William H. Willie;

A bill (H. R. 14994) granting an increase of pension to Daniel C. Joslyn;

A bill (H. R. 15499) granting an increase of pension to Elias Andrew;

A bill (H. R. 15500) granting an increase of pension to John W. Thomas;

A bill (H. R. 16319) granting an increase of pension to Orrin D. Nichols; and

A bill (S. 5842) granting a pension to Marie G. Lauer.

Mr. TALIAFERRO, from the Committee on Pensions, to whom was referred the bill (S. 5791) granting an increase of pension to Margaret Simpson, reported it with amendments, and submitted a report thereon.

He also, from the same committee, to whom was referred the bill (S. 5786) granting an increase of pension to Mary J. Ivey, reported it with an amendment, and submitted a report thereon.

He also, from the same committee, to whom were referred the following bills, reported them severally without amendment, and submitted reports thereon:

A bill (H. R. 16717) granting an increase of pension to Sterling Hughes;

A bill (H. R. 16941) granting an increase of pension to Thomas H. Hogan;

A bill (H. R. 11303) granting a pension to Joseph Matthews;

A bill (H. R. 16992) granting an increase of pension to John R. Baldwin;

A bill (H. R. 16993) granting an increase of pension to Melroe Tartar;

A bill (H. R. 15243) granting a pension to Artemesia T. Husbrook;

A bill (H. R. 15501) granting an increase of pension to Elizabeth Parks;

A bill (H. R. 16576) granting an increase of pension to Silas P. Conway;

A bill (H. R. 16577) granting an increase of pension to Joseph M. Pound;

A bill (H. R. 16602) granting an increase of pension to Christopher C. Reeves;

A bill (H. R. 16603) granting an increase of pension to Pleasant W. Cook;

A bill (H. R. 16881) granting an increase of pension to Joel R. Youngkin;

A bill (H. R. 16931) granting a pension to Cornelia Mitchell;

A bill (H. R. 16936) granting an increase of pension to Sherwood F. Culberson;

A bill (H. R. 16486) granting an increase of pension to Thomas Bosworth; and

A bill (H. R. 16466) granting an increase of pension to Asenith Woodall.

Mr. OVERMAN, from the Committee on Pensions, to whom were referred the following bills, reported them severally without amendment, and submitted reports thereon:

A bill (S. 5775) granting an increase of pension to Harvey M. Traver;

A bill (H. R. 16828) granting an increase of pension to Georgia A. Hughs;

A bill (H. R. 16541) granting an increase of pension to Ambrose Y. Teague;

A bill (H. R. 16540) granting an increase of pension to Sarah M. Evans;

A bill (H. R. 15058) granting an increase of pension to Enoch Rector;

A bill (H. R. 16530) granting an increase of pension to William H. Gautier;

A bill (H. R. 16529) granting an increase of pension to James M. Sikes;

A bill (H. R. 16527) granting an increase of pension to William Martin;

A bill (H. R. 16526) granting an increase of pension to James R. Hilliard; and

A bill (H. R. 16224) granting an increase of pension to Francis M. Crawford.

Mr. OVERMAN, from the Committee on Pensions, to whom was referred the bill (S. 5326) granting an increase of pension to Annie A. West, reported it with an amendment, and submitted a report thereon.

He also, from the same committee, to whom were referred the following bills, reported them severally with amendments, and submitted reports thereon:

A bill (S. 5801) granting an increase of pension to Andrew Jackson Parris;

A bill (S. 5800) granting an increase of pension to James N. Davis; and

A bill (S. 5742) granting an increase of pension to James A. Bryant.

Mr. GEARIN, from the Committee on Pensions, to whom were referred the following bills, reported them severally without amendment, and submitted reports thereon:

A bill (S. 4887) granting an increase of pension to Calvin C. Hussey;

A bill (S. 1174) granting an increase of pension to Edwin Morgan;

A bill (H. R. 8650) granting an increase of pension to Sewell F. Graves;

A bill (H. R. 9034) granting an increase of pension to Mary F. McCauley;

A bill (H. R. 12792) granting an increase of pension to William Wiley;

A bill (H. R. 13047) granting an increase of pension to Walter Saunders;

A bill (H. R. 13877) granting an increase of pension to Juan Canasco;

A bill (H. R. 15977) granting an increase of pension to Mary E. Ramsey;

A bill (H. R. 16186) granting an increase of pension to William T. A. H. Boles; and

A bill (H. R. 16271) granting an increase of penison to Edwin Elliott.

Mr. GEARIN, from the Committee on Pensions, to whom was referred the bill (S. 215) granting a pension to Elias Phelps, reported it with amendments, and submitted a report thereon.

He also, from the same committee, to whom was referred the bill (S. 4133) granting an increase of pension to George Brewster, reported it with an amendment, and submitted a report thereon.

REGULATION OF RAILROAD RATES.

Mr. DANIEL. Mr. President, I desire to give notice that to-morrow morning, after the morning business, I should like to address the Senate on the rate bill.

The VICE-PRESIDENT. The notice will be duly entered.

BILLS INTRODUCED.

Mr. DANIEL introduced a bill (S. 5951) to repeal section 3480 of the Revised Statutes of the United States; which was read twice by its title, and referred to the Committee on the Judiciary.

He also introduced a bill (S. 5952) granting an increase of pension to Hyacinth Dotey; which was read twice by its title, and referred to the Committee on Pensions.

Mr. RAYNER introduced a bill (S. 5953) to appropriate money for the payment of certain advances made to the United States by the State of Maryland; which was read twice by its title, and referred to the Committee on Claims.

Mr. McENERY introduced a bill (S. 5954) for the relief of the Union National Bank of New Orleans, as the successor of the Union Bank of Louisiana; which was read twice by its title, and referred to the Committee on Claims.

Mr. BLACKBURN introduced a bill (S. 5955) granting a pension to Mary Elizabeth McCann; which was read twice by its title, and referred to the Committee on Pensions.

Mr. McCREARY, introduced a bill (S. 5956) to correct the military record of Milton Newcomb; which was read twice by its title, and referred to the Committee on Military Affairs.

He also introduced a bill (S. 5957) granting an increase of pension to Laban Rupard; which was read twice by its title, and, with an accompanying paper, referred to the Committee on Pensions.

Mr. PENROSE introduced a bill (S. 5958) granting a pension to Bernard Charles; which was read twice by its title, and referred to the Committee on Pensions.

Mr. HOPKINS introduced the following bills; which were severally read twice by their titles, and, with the accompanying papers, referred to the Committee on Pensions:

A bill (S. 5959) granting a pension to Catherine A. Wright; and

A bill (S. 5960) granting an increase of pension to George H. Eastman.

Mr. CARTER introduced the following bills; which were severally read twice by their titles, and referred to the Committee on Pensions:

A bill (S. 5961) granting an increase of pension to Eugene B. McSwyny; and

A bill (S. 5962) granting an increase of pension to John A. Richards.

Mr. KNOX introduced a bill (S. 5963) granting an increase of pension to James Reed; which was read twice by its title, and, with the accompanying papers, referred to the Committee on Pensions.

Mr. BACON introduced a bill (S. 5964) for the relief of the heirs of William Bullard, deceased; which was read twice by its title, and, with the accompanying papers, referred to the Committee on Claims.

ISTHMIAN CANAL.

Mr. MORGAN. I introduce a bill, which I ask may be read at length on its second reading.

The bill (S. 5965) to establish the plan of a ship canal to be constructed in the Panama Canal Zone, ceded to the United States by the Republic of Panama, under the provisions of the treaty promulgated on the 26th day of February, 1904, was read the first time by its title and the second time at length, as follows:

Be it enacted, etc., That the President of the United States is authorized to construct a ship canal in pursuance of the general plan hereinafter described, between the 40-foot contour in the Bay of Limon, Caribbean Sea, and the 40-foot contour in the Bay of Panama, to connect the waters of the Atlantic and Pacific Oceans through the Panama Canal Zone.

The central section of said canal shall be constructed as a canal with locks, through the highlands of Culebra and Emperador, for the distance of about 8½ miles, to be connected with the sea-level sections at each end by means of locks to be located in the vicinity of Obispo and Miraflores. It shall be not less than 40 feet in depth between such locks, and shall be, at the surface thereof, not more than 85 feet, and not less than 65 feet above sea-level, as shall be determined by the President of the United States.

SEC. 2. For obtaining and securing a necessary supply of water to said central section, and for purposes of regulating the flow of the waters of the Chagres River, a sufficient and permanent dam shall be erected across said river in the vicinity of Gamboa on a suitable foundation of rock and in accordance with the general plan that is recommended in the report of the majority of the Board of Consulting Engineers submitted to Congress by the President in his message of February 19, 1906; and a channel shall be made between the lake created by such dam and the central section of the canal above mentioned, which shall be of sufficient dimensions, elevation, and capacity to supply water from such lake for all the purposes of floatation and lockage, the generation of power to aid in the construction and in the working said central section to its highest capacity and to serve its continued use for all commercial purposes, and also for service in the regulation of the waters impounded in such lake, which shall be known as "Lake Gamboa."

SEC. 3. That the northern sea-level section of the canal shall be constructed along the valleys of the Obispo and Chagres rivers, so as to connect with the northernmost lock of the central section in the vicinity of Obispo and shall extend to the 40-foot contour of the Bay of Limon.

Said northern section of the canal shall have a depth of 40 feet below mean sea level and shall correspond, practically, with the route, the location, the dimensions, and as to the protection of the same against inflowing waters, as the same are described in the report of the majority of the Board of Consulting Engineers above referred to, but the same shall be subject to such alterations thereof, in all respects except as to the sea-level plan, as the President of the United States shall direct or approve.

SEC. 4. That the southern section shall be a sea-level canal, to be constructed from the southernmost lock of the central section, and so as to connect with it in the vicinity of Miraflores, to the 40-foot contour in the Bay of Panama by the most practical route. It shall not be less than 40 feet deep below the mean sea level and not less than 200 feet wide at any place. It shall be provided with a sea gate or left without such protection according to the direction or approval of the President of the United States.

SEC. 5. That the locks of the canal shall be double or twin locks, with usual capacity of not less than 800 feet in length and not less than 80 feet in width or less than 40 feet in depth over the miter sills. The locks shall not be placed in flights, but shall be located as nearly in connection with each other as may be safe and convenient, having regard to the permanent stability of the foundations thereof, and the location of the respective sets of twin or double locks and the plan and method of construction of such locks shall conform to the best and most economical use of water supply from Lake Gamboa for the most advantageous operation of the central section of the canal, all under the direction or approval of the President of the United States.

Mr. MORGAN. I move the reference of the bill to the Committee on Interoceanic Canals.

The motion was agreed to.

AMENDMENTS TO APPROPRIATION BILLS.

Mr. PILES submitted an amendment providing that leave of absence authorized by law to clerks in post-offices shall be construed exclusively of Sundays and holidays, intended to be proposed by him to the post-office appropriation bill; which was referred to the Committee on Post-Offices and Post-Roads, and ordered to be printed.

Mr. GALLINGER submitted an amendment relative to the pay and allowances of civil engineers and professors of mathematics in the Navy, intended to be proposed by him to the naval appropriation bill; which was referred to the Committee on Naval Affairs, and ordered to be printed.

WITHDRAWAL OF PAPERS—FRANCES A. BLISS.

On motion of Mr. BURNHAM, it was

Ordered, That the papers in the case of S. 3631, first session Fifty-ninth Congress, "For relief of Frances A. Bliss," be withdrawn from the files of the Senate, there having been no adverse report thereon.

WITHDRAWAL OF PAPERS—FOREMAN S. WELLS.

On motion of Mr. FORAKER, it was

Ordered, That the papers relating to the bill (S. 3679), Fifty-seventh Congress, for the relief of Foreman S. Wells, may be withdrawn from the files of the Senate, there having been no adverse report thereon.

IRRIGATION FROM SACRAMENTO RIVER.

The VICE-PRESIDENT. The morning business is closed.

Mr. TILLMAN. I ask that the unfinished business be laid before the Senate.

The VICE-PRESIDENT. Without objection, the unfinished business, being House bill 12987, will be proceeded with.

Mr. CLARKE of Arkansas. My friend the Senator from California [Mr. PERKINS] has a little matter of routine business that he desires to have transacted, and I yield to him for that purpose.

Mr. PERKINS. I thank the Senator from Arkansas kindly for the courtesy he has extended to me.

I ask unanimous consent for the present consideration of the bill (H. R. 11796) for the diversion of water from the Sacramento River, in the State of California, for irrigation purposes.

The Secretary read the bill; and there being no objection, the Senate, as in Committee of the Whole, proceeded to its consideration.

The bill had been reported from the Committee on Commerce with amendments.

The first amendment was, in section 1, on page 1, lines 8 and 9, to strike out "900 cubic feet per second of water" and insert "an amount of water which, at a stage of said river of 2 feet above low water, as determined by the United States engineer in charge of the improvement of said river, or at any lower stage, shall not exceed 900 cubic feet per second;" so as to read:

That the Central Canal and Irrigation Company, a corporation organized and existing under the laws of the State of California, and its successors, are hereby granted the right to divert, at all seasons of the year, from the Sacramento River, in the State of California, while and so long as such diversion shall not seriously injure the navigation of said river, an amount of water which, at a stage of said river of 2 feet above low water, as determined by the United States engineer in charge of the improvement of said river, or at any lower stage, shall not exceed 900 cubic feet per second, to be used for irrigating the lands of the Sacramento Valley, on the west side of the Sacramento River, in said State of California.

The amendment was agreed to.

The next amendment was, in section 1, on page 3, line 23, after the word "hereunder," to insert "instituted by the Government or any of its officers or agents;" so as to make the additional proviso read:

And provided further, That all costs accruing in any suit or proceeding hereunder instituted by the Government or any of its officers or agents shall be borne by the said Central Canal and Irrigation Company, its successors or assigns.

The amendment was agreed to.

The next amendment was, in section 4, on page 4, line 23, after the word "within," to strike out "one year" and insert "two years;" and in line 24 to strike out "three" and insert "five;" so as to make the section read:

SEC. 4. That this act shall be null and void if the actual construction of the structures for diversion and measurement of water herein authorized be not commenced within two years and completed within five years from the date hereof.

The amendment was agreed to.

The bill was reported to the Senate as amended, and the amendments were concurred in.

The amendments were ordered to be engrossed, and the bill to be read a third time.

The bill was read the third time, and passed.

REGULATION OF RAILROAD RATES.

The Senate, as in Committee of the Whole, resumed the consideration of the bill (H. R. 12987) to amend an act entitled "An act to regulate commerce," approved February 4, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission.

Mr. CLARKE of Arkansas. Mr. President, the pending bill is supposed to be a legislative response to the public demand that something shall be done to put limitations on the power of the common carriers of this country to unfairly tax and control its commerce. The question has received fragmentary attention in Congress and in the legislatures of many of the States. But the remedies that have been worked out and applied from time to time have been so inadequate and inefficient that the public has become almost hopeless of getting relief from any scheme of mere regulation. The magnitude of the evils of extortion and discrimination by the public carriers has grown until it has forced itself upon the attention of the country to such an extent that Congress now finds itself appealed to to remedy the wrong by striking at the very source of it. I feel compelled to say that if the pending bill, without being amended liberally and substantially, is to be the response made by this Congress to that appeal, we shall stand before the country inviting one of two criticisms—either that we have a meager and erroneous conception of the overpowering and widespread evil that calls for correction, or a very limited capacity, and a much more limited disposition, to devise adequate remedies to suppress evils of magnitude after their existence become manifest.

The bill as it now stands, in my humble opinion, is based upon an erroneous theory of regulation from its very first provision to its last. It betrays a rare ignorance of the evils to be overcome and of the methods available to Congress in their suppression. In the first place, the bill provides for the correction of a single rate, or the rate upon a single classification of freight, rather than for a comprehensive regulation of the entire schedule of rates charged by any given carrier. Even the partial remedy provided in the correction of the evil presented by a single excessive rate is only to be made upon complaint involving the challenged rate. This should not be so. The business of compelling common carriers to discharge their duties to the public is governmental in its character, and should be approached with that independence and fairness that should characterize the discharge of public duties and the exercise of

public power. No shipper or patron of the railroad should be compelled to involve himself in an adversary contention over the rates to be charged with the carrier. The contest is an unequal one. The means available to the offended carrier to punish and destroy the complaining shipper are too numerous and subtle to warrant the belief that the right of complaint will be independently and courageously exercised. When a course of conduct has become so notorious as to constitute a part of the everyday knowledge of life, it is the duty of those who hold the governmental power of correction to assume the burden of applying the remedy without exposing the interests of any citizen to the aroused resentment of the powerful class whose abuse of permitted opportunities and powers has made necessary a resort to the remedial powers of the Government. That the transportation of the country has been and is afflicted by a systematic and all-pervading burden of extortion and discrimination practiced by the carriers is a matter that is not seriously disputed.

The transportation facilities of the country have been combined to such a wide extent and in such close alliance that the matters of fixing the tax on transportation and of practicing discrimination between shippers and places are subject to no limitation except the arbitrary edict of those who control the business. Unless it be true that the transportation tax imposed by the limited number of persons who control the transportation facilities of the country is extortionate and confiscatory, then the agitation for the passage by Congress of a comprehensive and effective system for prescribing rates must be viewed in the light of a gigantic conspiracy against the commercial tranquillity of this country. The universality of the demand that Congress shall interpose the strong hand of the National Government to prevent imposition being practiced is evidence that those who are interested in our commercial prosperity and opportunities do not so regard this movement. That this sentiment pervades all classes of our people, and is persistently and earnestly pressed upon our attention, ought to convince us that it represents the conservative sentiment of the country, and is not due to any spirit of temporary unrest artificially produced by the irresponsible and sensational elements of our population. The agitation is the outgrowth of the nullification of the law of competition by the abnormal development of the evil of combination. I do not cry out against the men who have brought about this situation, for in doing so they have only pursued methods allowed by law, and have simply followed the bent of human instincts and inclinations. What they have done others would do, similarly situated. They are merely doing the things that education, environment, and interest qualify them to do, only too well for the general welfare of society. But legislative power is created to restrain, in some measure, the unfair assertion of selfish instincts.

In a strictly private employment, as long as a man avoids doing those things for which he might be put in jail, no one can legally complain; but when he seeks to unfairly advance his interest, at the expense of those who have equal rights, through the agency of a public privilege or franchise, he must submit to such regulations as will protect the rights of others and accord to him all to which he is legally entitled. The power of Congress to delegate to a commission the authority to prescribe rates to be charged by common carriers engaged in interstate commerce has been much disputed. I do not share the belief that there is any doubt about the authority of Congress to confer plenary power for this purpose. I think the right to confer this authority is a logical and inevitable extension of the doctrines and practices that have been declared and established by the court decisions and the course of legislation that have for their ultimate purpose the widening and broadening of national authority. Unless the Supreme Court of the United States has been uncandid with the public in what has been said in more than a score of decisions, the existence of this power must be admitted. That that great Court has not perpetrated a deception in this behalf I am convinced beyond all doubt. The power of the States to interfere with or regulate to any extent interstate commerce has been so uniformly denied that none now are bold enough to complain that it is so, to say nothing of insisting that it is otherwise. The Constitution says that all powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States, respectively, or to the people. It is certain, therefore, that this power to regulate interstate commerce has not been reserved to the States, as their powers in this behalf have been defined by the Supreme Court of the United States, which is the final arbiter in such matters.

LEGALITY, DELEGATION OF RATE-MAKING POWER DOUBTFUL.

Notwithstanding I admit without reservation the power of Congress to delegate to a commission the power of fixing the tax to be imposed upon the transportation of the country by the carriers, I am not so sure that the delegation attempted by this bill is a valid exercise of the power. The power delegated is to prescribe just and reasonable rates, without fixing any standard by which this fact of justice and reasonableness is to be determined. The rule by which the validity or invalidity of a given delegation of legislative power is made to appear is laid down in the recent case of Buttfield *v.* Stranahan. (192 U. S., 496.) It is there said that the delegation will be valid if it appears that Congress has legislated on the subject as far as was reasonably practicable and then, from the necessity of the case, is compelled to leave to executive officials the duty of bringing about the results pointed out by the statutes. It is obvious to anyone who gives a moment's consideration to the question that a mere general direction to prescribe railroad rates that will be just and reasonable leaves to the Commission a vast field for the exercise of discretion as to the policy and wisdom of adopting one course or another, which, when it eventuates in completed form, may be said to prescribe just and reasonable rates. As there are many ways in which this business of fixing just and reasonable rates can be accomplished, according to the judgment of the person rendering the service, the choice as between these means is a legislative one. I think that Congress should formulate as definitely as practicable the basis upon which, or the standard by which, the justice and reasonableness of rates should be ascertained. I think that it is competent for Congress—in fact, I deem it to be the duty of Congress—to provide for the ascertainment of the value of the property of the several railroad corporations engaged in interstate commerce, and by an established method that will afford to each transportation company an opportunity to be represented and heard in the inquiry which is to result in fixing the value of its property.

As human intelligence must enumerate the elements that enter into this aggregate valuation, Congress should indicate which of these elements and how many are to be considered in fixing the value. If the franchise value is to be deemed a part of the value of the investment for the purpose of ascertaining a basis upon which a reasonable return to the carrier is to be computed, it should say so in terms, that the rule may be observed in all cases. If the bond and stock flotations are to be considered for any other purpose than as a mere particle of evidence, throwing light upon the ultimate question of value, definite directions as to this should be given. Then I believe that after the basis of actual value has been ascertained in a way that will challenge respect and be recognized and enforced in all tribunals where it may become a material inquiry, that Congress should indicate what is to be deemed the extent of income that will satisfy the carrier's right to just and reasonable rates. It may be that in a country where conditions differ as widely in the several sections as is the case in ours that an arbitrarily fixed percentage would not in all cases do justice. But this can be provided for by arranging a minimum and maximum, within the limits of which the Commission can be guided in any given case.

It is not my intention to discuss at length the many obvious defects in this bill, because it is my purpose to devote the greater part of the time I shall impose myself upon the patience of the Senate to the discussion of a defect which pertains to a matter of procedure, by which the orders of the Commission, when made, may be relieved of interference by the inferior Federal courts of the country in the exercise of the unlimited right to grant preliminary injunctions. It is a matter of common knowledge among the lawyers of the country that the right to issue injunctions of this character has been abused very greatly in recent years. But whilst it is my purpose to confine myself largely to the discussion of this particular defect, I have not thought it to be proper to entirely omit reference to others.

RIGHTS OF RAILROAD CONSTITUTIONALLY PROTECTED.

The property rights of the carrier, in so far as the same may be affected adversely by Congressional legislation, are absolutely secured against wrongful invasion by the Constitution of the United States and the decisions of the Supreme Court of the United States practically applying and adapting the guaranties of that instrument. There is no possible way by which the common carriers of the country can be compelled to serve the public without receiving for the service just compensation for the use of their property so employed. These companies enjoy absolute immunity from any wrongful invasion of their rights by legislation. This has been decided so often that it has come to be understood as part of the elementary knowledge of the subject. I therefore maintain that it is the duty of Congress to occupy, with a system of comprehensive, intelligent, and effective regulation, every square inch of the territory which lies outside of the barriers of the Constitution, behind which

the rights of the carriers are securely intrenched. Within this zone lie the rights of the public, and by the wrongful invasion of this domain by the carriers are the interests of the public injured and destroyed. The fact that the common carriers have not respected the rights of the public is our justification for seeking to devise and apply a remedy, as we are now doing. That some remedy should be applied all agree. The difference is as to the extent and effectiveness of the relief to be afforded. I believe that as our power is equal to our responsibility, the remedy we tender to the public should be as wide as the mischief, and that its execution should be along lines that will advance the remedy and suppress the mischief. In making these laws we should approach the duty in a frame of mind that will enable us to say that we have no conscientious scruples against doing what is right where the law and the evidence justify it.

The ingenuity of this particular class of lawbreakers has been strengthened and made familiar by an unobstructed exercise for many years, and any attempt upon the part of the lawmaker now to match his ingenuity against that of his adversary must be based upon a knowledge of the fact that he is dealing with one who has enjoyed his immunities so long that by toleration and acquiescence he has come to believe that his wrongdoing has become consecrated into a vested right. We shall not quit the subject with the consciousness of duty well performed if we put upon the statute book a law of meaningless generalities, that for practical purposes signifies nothing, and this, in my opinion, is what this bill unamended will do. We will find ourselves in the situation that the late John J. Ingalls said Kansas found herself in as the result of the adoption of a prohibition amendment to the State constitution. He said that the Prohibitionists of Kansas had all the law they wanted, and the whisky drinkers had all the whisky they wanted. I trust, therefore, that we shall not find that the railroad commission has all the law it wants, and the railroads are in the enjoyment of the right to collect all the rates they want. Although I say I trust that this will not be the result, if I were called upon to give a definite statement of my real opinion, I should find myself under the necessity of recording here and now the prediction that the passage of this bill, unamended in many substantial particulars, will result in a statutory condition that will never regulate, in the direction of a reduction, a single extortionate rate demanded by the railroads. It will amount simply to the introduction for a second time of the colorless regulation that was practiced by the Commission from 1887 to 1897, when it deemed itself to be possessed of the rate-making power. The power then supposed to exist was exercised so mildly that the railways of the country were unable to draw a distinction between the power of supervision exercised by the Commission and that exercised by their own traffic managers.

STATE AND INTERSTATE COMMERCE NOT DEFINED.

Another obvious defect in existing laws that is not remedied by the provisions of the pending bill is one made manifest in the decision of the Supreme Court in Smyth *v.* Ames, 169 United States. In that case the court says: "In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by States for the transportation of persons or property wholly within its limits must be done without reference to the interstate business done by the carrier or the profits derived from it." Now, if a similar rule is to be applied, and there is no reason why it shall not be, in the ascertainment of the reasonableness or unreasonableness of rates fixed by the Interstate Commerce Commission, the result is that when the State commissions attempt to fix rates for that part of the traffic which is wholly within the State no notice whatever can be taken of the business interstate in character, and when the National Commission proceeds to ascertain what is a reasonable rate for interstate business no notice can be taken of that part of the carrier's business which originates and ends in a particular State. This is a practical difficulty growing out of the dual character of the government under which the railroads operate, and ought to be definitely and decisively provided for in this bill. Unless the court shall recede from its position as established in that case, the omission from the present bill of some proper provision on this subject will constitute a defect the existence of which is not in the slightest degree complimentary to the information of its framers, assuming always that they were inspired by an honest purpose to correct the defects that are within the limits of their knowledge.

CONGRESS HAS POWER TO PREVENT ISSUE OF PRELIMINARY INJUNCTION IN ANY CASE.

But, as I said a moment ago, my main purpose in taking the floor to-day is to say something in support of the proposition that Congress has power to prohibit the courts from issuing a preliminary injunction suspending the orders of the Commission pending a final disposition in the United States circuit court. I shall not only claim that Congress has this power, but I shall insist that the considerations which support the demand for its exercise in this instance are stronger than those that can be advanced in support of any one of the three distinct instances where Congress has exercised that power heretofore and to the satisfaction and approval of the Supreme Court of the United States.

I shall also have something to say upon the scope and effect of the court review of the orders of the Commission. I think Congress has nothing to do with the character of the review. I believe that the extent of judicial review is fixed by the Constitution itself, as expounded by the decisions of the Supreme Court. It has been exercised up to the present time to the utmost limit that it ever will be extended. The widest delegation of authority to the courts would confer no greater power in this behalf than the most specific limitation which we could incorporate into the statute.

Under ordinary circumstances it would be necessary for Congress to consider only the wisdom and policy of denying a resort to that feature of the judicial remedy afforded by the process of a preliminary injunction, in the light of the facts and circumstances brought forward in support of the particular application for such prohibition. The power to do so would be conceded. But the respect due to any contention seriously made by the distinguished Senators from Wisconsin [Mr. SPOONER] and Pennsylvania [Mr. KNOX] respecting a matter of law or procedure, presents a situation in which it well becomes those who would antagonize what they assert to be careful. Their deliberate support of any proposition will rescue it from any assault or criticism lightly made, and entitles it to be dealt with as one of the disputed questions of the law that can at least be attractively and plausibly exploited, if not successfully defended and maintained.

These Senators introduce for the first time, so far as any diligence I am capable of exercising has enabled me to locate any instance of its being done, a distinction between judicial power and the jurisdiction of a court to administer it. That courts can do many things incidental to the exercise of jurisdiction that are not specifically mentioned in the act creating the court and defining its jurisdiction is not denied. For instance, it inheres in the very function of the court that the judge or judges thereof shall have the right to choose as between conflicting or apparently conflicting principles those that will be recognized and applied as having the force of law in the decision of any given controversy. Nor can any legislative tribunal, in creating the court, direct the particular decision to be given, where the facts are conflicting or where the principles of law that would otherwise govern are established and recognized. The right to decide involves the right to choose the particular course of decision. But we have no such question here. We are dealing with the power of Congress to prescribe to one of the courts which owes its existence to legislative act a course of procedure in the merely incidental matter of issuing a process. The granting of a temporary injunction and the hearing incidental thereto rarely ever involve any consideration or decision as to the ultimate merits of the controversy. The effect is simply to preserve the subject-matter of the controversy in as nearly the same condition in which it is found as is practicable.

IF COURT HAS DISCRETION IN ONE CASE, CONGRESS HAS IN ALL OF A CLASS.

The grant or refusal of a preliminary injunction, therefore, only incidentally involves the ultimate rights of the successful litigant. In the very nature of things, the granting of such a process will disturb existing conditions, and it frequently calls for a nice balancing of consequences to determine whether greater harm will not result from the issue of the injunction than from its denial. The issue of the writ is therefore a matter of mere discretion with the judge or court to which application is made. This discretion is absolute, since no appeal will lie from a refusal to issue such a writ. It is not in any sense a suit or action, but is a mere process incidental to a suit or action. There is no such thing as a suit having for its independent and distinct purpose the mere issue of a preliminary injunction. It is the equivalent, in a court of equity, of the writ of attachment in a court of law. No reason is perceived why, if a writ of attachment may be denied in a court of law to seize and hold the property or its proceeds until the right thereto has been determined in an action, a similar right of abolition does not attach to the equivalent writ in a court of equity designed to accomplish the same purpose. There is nothing in the origin or history of the preliminary writ of injunction to controvert this suggestion to the extent of rendering it subject to the criticism of being unfairly applied here. This writ is the very counterpart

of the interdict of the prætor under the Roman law. When the English chancery jurisdiction began to develop as a branch of the royal prerogative, the peculiar character of relief necessary to do justice effectively made it inevitable that in many cases injunctive relief should be granted in advance of the hearing, if justice was to be fully done in the end. We accordingly find in the very earliest recorded history of the chancery jurisdiction, when its powers were exerted and its remedies administered by the king in person, that preliminary injunctions were employed as a part of the system. It is said that the first recorded instance of a preliminary injunction being issued occurred in the time of Henry II. As the chancery jurisdiction was extended to the numerous cases where the harsh and technical rules of the courts of the common law would not enable them to do full justice, the writ of preliminary injunction was accordingly made use of more frequently.

The courts of equity are said to have been invented for the correction of that wherein the law, by reason of its universality, was deficient. The wholesome and effective character of relief to be gained in many cases through employment of the preliminary injunction where there would otherwise be a miscarriage of justice made the writ exceedingly popular, and this very popularity caused it to be abused to such an extent as to make it manifest to those who are charged with the duty of making laws to put limitations upon the right that would operate to prevent its abuse without impairing its real usefulness. Accordingly, we find that by legislation notice to the adversary party is required wherever it is practicable to give the same before making application for the writ. Certain judges are empowered to grant the writ, while others are denied the right by not having the same conferred upon them. Bonds are required to indemnify, as nearly as such a provision can, the persons whose rights are interfered with by the writ in the event it should be subsequently determined that it was wrongfully applied for and issued, and in some cases, in the exercise of the sovereign power to make laws, the legislature has denied to the courts the right to issue the writ at all. Our statute books contain three well-known instances where Congress has denied to the courts power to issue this writ, and its action in doing so has been expressly recognized and loyally respected by the Supreme Court of the United States, as I shall undertake to show as I proceed. I am not willing to be numbered among those who declaim vociferously against the employment of the writ of injunction; neither am I to be numbered among those who treat it as a specific for all the ills of life that are subject to judicial inquiry and determination. Our complex governmental and commercial conditions imperatively require that in a just determination of the numerous controversies that come about between individuals this writ shall at all times be available for rational and equitable service. But while I admit this, I also insist that it is a process whose employment is to be regulated by law, and that the law-making power not only has power, but it rests under an imperative obligation to deny its use whenever, in the exercise of its best judgment, it is apparent that the exercise of the power rightfully belonging to other governmental agencies will be unfairly obstructed in the due administration of the powers permitted to them. Whilst the process is important, and is therefore to be interfered with cautiously, and only after the propriety of doing so has been thoroughly considered and determined, yet the power to do so when the necessity for its exercise is made manifest is what we insist upon now.

PRELIMINARY INJUNCTION A MERE PROCESS.

As indicating that the writ of injunction is invariably treated as a mere process to be employed for incidental purposes in the administration of justice, and as such is subject to legislative control, it is permissible to call attention to the fact that in many of the States a reformed system of pleading and practice, known as the "code system," has been adopted, and in nearly all of these the writ of injunction has been in terms abolished by statute, and provision made by statute for the issuing of restraining orders by the judges and under the conditions therein named. Wisconsin is among the States that have pursued this course, as will be seen from the following extract from its revised statutes:

SEC. 2773. The writ of injunction is abolished. The injunction provided by law is a command to refrain from a particular act. It may be the final judgment in the action or may be allowed as a provisional remedy, and when so allowed it shall be by order in the form prescribed in this chapter. The order may be made by the court in which the action is brought or by a judge in the cases provided in this chapter, and when made may be enforced as the order of the court.

But our inquiry on this occasion is as to the authority of Congress to provide that the orders of the Interstate Railway Commission fixing rates shall not be suspended or interfered with by any preliminary injunction in advance of a decision by the circuit court.

That this is true ought to be considered as established, when we consider the nature of the National Government and the powers that it can rightfully exercise. In the first place, the National Government is one of delegated powers. There is no such thing as a national common law. There are therefore no common-law courts nor common-law powers of courts, nor does there exist any common-law source upon which courts may draw to supply themselves with desirable powers, which are inadvertently or otherwise withheld by statute. That this is true was recognized by the Supreme Court of the United States at a very early date, as will appear in the following extract from the opinion of Chief Justice Marshall, in the case of Ex parte Bollman (8 Cranch, 93):

As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the Constitution or by the laws of the United States. Courts which originate in the common law possess a jurisdiction which must be regulated by the common law until some statute shall change their established principles; but courts which are created by written law and whose jurisdiction is defined by written law can not transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court, and with the decisions heretofore rendered on this point no member of the bench has, even for an instant, been dissatisfied. The reasoning from the bar in relation to it may be answered by the single observation that for the meaning of the term "habeas corpus" resort may unquestionably be had to the common law, but the power to award the writ by any of the courts of the United States must be given by written law.

It has not been denied in this debate nor anywhere else by those who are entitled to be heard in the discussion of such questions that all the courts of the United States inferior to the Supreme Court are of statutory origin and that only such part of the judicial power of the United States as Congress has assigned to these can be exercised by them, respectively. This is not only true as to the subject-matter of litigation, but it is true in reference to the pleadings, writs, and other matters of procedure through and by which the system of courts is created and in accordance with which they administer justice. None of these courts have ever attempted to issue any writ or to take cognizance of any proceeding without being able to predicate its action in doing so upon some statute either prescribing the rule or adopting the scheme of procedure prevalent in the States or in the high court of chancery of England. Attentive examination of the decisions of our Supreme Court will show that in every instance save one, that of Florida *v.* Georgia, in 17 Howard, that court has insisted upon statutory authority for every step taken by it or permitted to the inferior courts when challenged.

In the case of Florida *v.* Georgia the court did proceed to hear the controversy under a system of pleading and procedure established by itself, but in doing so it took occasion to say that it did this in the absence of legislation by Congress, in order that there might not be a failure of justice. But it broadly and unmistakably stated that if Congress had prescribed rules governing its procedure that it would be compelled to conform thereto. From the very earliest day, as early as 1789, Congress has assumed to provide the means by which the Federal courts could supply themselves with the necessary means and machinery for discharging the duties imposed upon them. I call attention to the following sections of the Revised Statutes, which were originally passed prior to 1842.

ALL PROCESS SUCH AS CONGRESS AUTHORIZES.

Section 716 of the Revised Statutes, indicated as section 14 of the act of 1879, provides:

The Supreme Court and the circuit and districts courts shall have power to issue writs of scirs facias. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Section 917 proves that—

The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice to be used in courts of equity or admiralty by the circuit and district courts.

SEC. 913. The forms of mesne process and the forms and modes of proceeding in suits of equity and of admiralty and maritime jurisdiction in the circuit and district courts shall be according to the principles, rules, and usages which belong to courts of equity and of admiralty, respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the Supreme Court, by rules prescribed, from time to time, to any circuit or district court, not inconsistent with the laws of the United States.

The pleadings, practice, and writs employed in the trial of cases on the law docket of the Federal courts is the same as that in the

State courts of the State wherein the Federal court is sitting, except where expressly changed by Federal statute. This is so because of an express provision of an act of Congress that it shall be so. The practice in equity cases in the Federal court is the same in all the States, because Congress has so provided in the direction given to the Supreme Court to prescribe the rules which shall govern in such cases. At an early day, the Supreme Court, in execution of this statutory authority, formulated a number of rules which provided a system of procedure substantially similar to that which prevailed in the high court of chancery in England at the time of the adoption of the Constitution of the United States. In addition to the several rules covering particular features of the practice and procedure, the court adopted rule 90, indicating the source from which additional rules of procedure might be adopted and applied in the event a case should arise which was not covered by the provisions of any existing rule. Rule 90 of the Rules of Practice for the Equity Courts of the United States is as follows:

> In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

The whole matter, therefore, of providing a system of pleading, practice, and procedure for the Federal courts is regulated by statute, directly or indirectly. That this is so has been recognized by the Supreme Court of the United States, and made the basis of its action when its judgment has been invoked in cases that involved the matter. There is no intimation anywhere in any of the cases to be found in the books that in the matter of processes to be employed the court itself acts, or permits the inferior courts subject to its supervision to act, in the exercise of any pretended inherent power to frame remedies independent of the action of Congress, simply because by so doing they might thereby more effectively protect the rights of persons who come into the courts for their vindication. Instances are to be found where the most meritorious writs and proceedings in the entire field of jurisprudence have been refused in cases that obviously called for a remedy, for the sole reason that Congress had not authorized the courts to employ them. It was true in the case of a writ of habeas corpus and in the most useful proceeding of mandamus. The court has not only insisted that there shall be statutory authority for every step that it takes, but it has not treated the legislation of Congress under that latitudinous rule of construction which would permit it to seize upon general phrases in the statute to include thereunder matters resting on the same reason as those mentioned. The construction has been rather strict than otherwise, and under this rule the court has limited the right of Federal courts to issue the writs of mandamus and other writs to such instances as they may be so employed in aid of a jurisdiction expressly conferred, and not to an unlimited extent as independent remedies. As indicating somewhat the extent to which the courts have gone in this direction, I will read here extracts taken from a number of the opinions of the Supreme Court.

SUPREME COURT RECOGNIZES CONTROL OF CONGRESS.

In Livingston *v.* Story (9 Pet., 656), it is said:

> That Congress has the power to establish circuit and district courts in any and all of the States, and confer on them equitable jurisdiction in cases coming within the Constitution can not admit of doubt. It falls within the express words of the Constitution. "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." (Art. 3.) And that the power to ordain and establish carries with it the power to prescribe and regulate the modes of proceedings in such courts admits of as little doubt.

In speaking of the obligation assumed by sureties on injunction bond, the Supreme Court in Bein *v.* Heath (12 How., 178) says:

> Now, there is manifest error in subjecting parties to an injunction bond, given in a proceeding in equity in a court of the United States, to the laws of the State. The proceeding in a circuit court of the United States in equity is regulated by the laws of Congress and the rules of this court made under the authority of an act of Congress.

In United States *v.* Howland (4 Wheat., 113) the court says:

> And as the courts of the Union have a chancery jurisdiction in every State and the *judiciary act* confers the the same chancery *powers* on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other States.

In Ames *v.* Kansas (111 U. S., 472) the court says:

> The judicial power of the United States exists under the Constitution, and Congress alone is authorized to distribute that *power* among courts.

In Boyla *v.* Zacharie (6 Pet., 657) the court says:

> And the settled doctrine of this court is that the remedies in equity are to be administered, not according to the State practice, but according to the practice of equity in the parent country as contradistinguished from that of courts of law, subject, of course, to the provisions of the acts of Congress and to such alterations and rules as, in the exercise of the powers delegated by those acts, the courts of the United States may from time to time prescribe. (Robinson *v.* Campbell, 3 Wheat., 212; U. S. *v.* Howland, 4 ibid., 108.) So that, in this view of the matter, the effect of the injunction granted by the circuit court was to be decided by the general principles of courts of equity and not by any peculiar statute enactments of the State of Maryland.

In Bath County *v.* Amy (13 Wall., 244) the court says:

> Were there nothing more in the judiciary act than the grant of general authority to take cognizance of all suits at common law and in equity *it might well be doubted* whether it was intended to confer the extraordinary power residing in the British court of King's bench to issue prerogative writs. All doubts upon this subject, however, are set at rest by the fourteenth section of the same act, which enacted that circuit courts shall have power to issue writs of *scire facias* and *habeas corpus* and all other writs not specifically provided for by statute which *may be necessary for the exercise of their respective jurisdictions* and agreeable to the usages and principles of law. Among those other writs no doubt mandamus is included; and this special provision indicates that the power to grant such writs generally was not understood to be granted by the eleventh section, which conferred only to a limited extent upon the circuit courts the judicial power existing in the Government under the Constitution. Power to issue such writs is granted by the fourteenth section, but with the restriction that they shall be necessary to the exercise of the jurisdiction given. Why this grant if it had been previously made in the eleventh section? The limitation only was needed.

The Senator from Wisconsin, when he last addressed the Senate, sought to draw a distinction between the writs of habeas corpus and mandamus and the writ of preliminary injunction, by saying that the former, in Great Britain, were treated as high prerogative writs, whereas the writ of injunction was a judicial writ, entirely subject to control by the courts of equity, and not in any wise subject to be dealt with by the legislature in a way that any judge authorized to issue the same would deem to be an abridgment of his right. The judge who wrote the opinion in Bath County *v.* Amy said that at one time there was some doubt as to whether or not a general grant of jurisdiction to the Federal courts would carry with it the power to take jurisdiction of such proceedings as mandamus, but he also added that all doubt on that subject had been put at rest by the passage of the judiciary act of 1789, by the section as quoted above. He said that after the passage of that act all writs enumerated in the section or included in its provision should be dealt with in the same way. If these writs are to be dealt with in the same way and Congress has authority to abolish the use of the writ of mandamus in any case it may see proper, no reason is perceived why a similar right should not be exercised with reference to the writ of injunction. There is no distinction made in the Constitution of the United States between the rights, power, and authority of courts of equity and courts of law. It invests the courts with jurisdiction to hear and dispose of all cases of law or equity arising under the laws of the United States or belonging to certain other enumerated classes. But it will serve no really useful purpose to consume more time in attempting to show that Congress can rightfully deny the right to resort to the writ of preliminary injunction in any instance that, in its judgment, such a course should be adopted. The power of Congress to do so has not heretofore been denied, but, on the contrary, it has been exercised in three conspicuous instances, and the statutes by which the same has been done have been recognized and enforced by the Supreme Court of the United States without question or discussion as to policy or validity. In every instance where parties have relied upon the statute as a means of preventing an adversary from resorting to the remedy by injunction, the court has gone no further into the question than to determine whether or not the case made is one of those condemned by the statute denying the injunction. When this condition has been ascertained to exist, the court has invariably said in plain terms that the statute controls, and it was accordingly followed and made the rule of action in that particular case. There was no pretense made in any of the opinions in which it came under review that in the passage of the statute Congress had simply reenacted rules that were otherwise the law. It was treated simply as a case where the rule *ita lex scripta est* applies.

In order that the Senate may understand the scope and character of my contention in this behalf, I will now direct attention, in consecutive order, to the three instances to be found in our statutes where Congress has prohibited the courts from issuing the writ of injunction:

I call attention first to section 720 of the Revised Statutes, being a provision contained in the judiciary act of 1789. The section is as follows:

PROCEEDINGS IN STATE COURTS SHALL NOT BE ENJOINED.

> SEC. 720. The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

The statute has served a very useful purpose in promoting harmony of administration in the peculiar system of govern-

ment under which we live. The anomalous situation of having courts equal in authority and deriving their powers from different sovereignties, administering justice in the same locality and among the same people, afforded a fruitful source of strife, or at least the opportunity for it, by the inspired ingenuity which at times characterizes the legal profession in designing ways and means by which the law's delays are made no less. The Senator from Wisconsin, when he addressed the Senate on March 23, 1906, in referring to this statute and the reasons which prompted Congress to enact it, said:

> There were good reasons and strong reasons, peculiar to our form of government, which led Congress of that day to prohibit injunctions to restrain proceedings in State courts, for we have States.

It is no argument against the power of Congress to do a particular thing to say that good reasons and strong reasons should exist before the power is exercised. Good reasons and strong reasons ought to exist in support of any exercise of legislative authority by Congress at this late day, and especially should this be true when we come to curtail the power of a chancery court to issue a writ of preliminary injunction—a right of very ancient origin and usually of salutary effect. The reasons why I think the right to prohibit issuing preliminary injunctions should be still further exercised in this case is because I believe that the reasons which support our contention are not only strong reasons and good reasons, but they are stronger reasons and better reasons than exist in support of the enactment of section 720. But I think the consideration of this question has been taken out of the domain of debatable propositions by the action of the Supreme Court of the United States in the manner in which it has dealt with the several acts of Congress limiting the powers of the Federal judiciary in issuing injunctions by the numerous decisions rendered in controversies where such statutes were involved, and the explicit and decisive acceptance of the provisions thereof as the basis of decision. Among lawyers, where a practice or a principle is recognized and applied without question, in controversies, and among litigants, where objection to its validity should be urged by those interested, with a view of having these objections recognized or repudiated by the court, and this is not done, it is assumed that it was omitted because the formative stage of the discussion had been passed. I shall call to the attention of the Senate, without commenting on each case, the decisions of the Supreme Court in which this question of the right of Congress to deny the right of the chancery courts to issue the writ of injunction has been under consideration.

A very meritorious case was made in Haines *v.* Carpenter. It did not involve any actual conflict of jurisdiction. The matter was proceeding in a way that both courts might have gone on without the least inconvenience. Judge Bradley, in writing the opinion reported in 91 U. S., p. 254, says:

> In the first place, the great object of the suit is to enjoin and stop litigation in the State courts, and to bring all the litigated questions before the circuit court. This is one of the things which the Federal courts are expressly prohibited from doing. By the act of March 2, 1793, it was declared that a writ of injunction shall not be granted to stay proceedings in a State court. This prohibition is repeated in section 720 of the Revised Statutes, and extends to all cases except where otherwise provided by the bankrupt law. This objection alone is sufficient ground for sustaining the demurrer to the bill.

In the case of Sargent *v.* Helton (vol. 115, U. S. Ct. Rep., p. 350) Judge Wood, in writing the opinion, says:

> The circuit court of the United States was therefore—

After having quoted section 720 he continues—

> The circuit court of the United States was therefore deprived of the power—

Not of jurisdiction, but was deprived of the power—

> The circuit court of the United States was therefore deprived of the power, by the section just quoted, to protect the rights of the plaintiff, unless the writ of injunction was authorized by the law relating to proceedings in bankruptcy.

If there is any virtue in the contention that the right to issue injunctions is a part of the judicial power, and is not a simple matter of jurisdiction to be given or withheld by statute, the language of this decision must be deemed an authority against the position assumed by the Senators from Wisconsin and Pennsylvania. The thing of which the court was deprived by the statute was the power to issue the injunction.

In Dial *v.* Reynolds, in 96 United States, page 340, the same statute came before the court. The judge said:

> There are two objections to these bills: (1) The gravamen of what is desired as to Reynolds is an injunction to prevent his proceeding at law in the State court. Without this, all else is of no account. Any other remedy would be unavailing. Such an injunction, except under the bankrupt act, no court of the United States can grant.

For the simple reason that the statute said they could not grant it.

> With this exception, it is expressly forbidden by law.

The decision is placed squarely and explicitly upon the ground that the courts are expressly prohibited by statute from issuing an injunction in a case of that kind.

In Chapman *v.* Brewer (114 U. S., 172) it is said:

> It must be held that Congress, in authorizing a suit in equity in a case like the present, has, in order to make the other relief granted completely effective, authorized an injunction, as necessarily incidental and consequent, to prevent further proceedings under the levies already made and new levies under the judgment. But for the supposed inhibitory force of section 720, a court of equity in granting, on the merits, the other relief here granted, would necessarily have power to award the injunction. We think the circuit court was authorized to award it here within the exception in section 720.

That was a case where the court had to find warrant for the issuance of a writ of injunction, and it is said that the exception contained in section 720 affirmatively gave it power to interfere there.

In the case of In re Sawyer (124 U. S., 219), the judge who wrote the opinion says:

> The restraining order of the circuit court *was void*, because in direct contravention of the peremptory enactment of Congress, that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except when authorized by a bankrupt act.

In the case of the United States *v.* Parkhurst-Davis Company (176 U. S., 320), Judge Brewer disposes of the question presented by saying:

> Upon these admissions and facts the case comes clearly within the provision of section 720 of the Revised Statutes, to the effect that no writ of injunction shall be granted by a court of the United States to stay proceedings in any court of a State except in matters of bankruptcy.

After quoting from the decision of Judge Bradley in the case of Haines *v.* Carpenter (91 U. S., 254), he concluded:

> Without stopping to consider any other questions presented by counsel, this is sufficient to sustain the ruling of the circuit court, and the decree is affirmed.

There is not a single intimation in any of the opinions delivered in the cases mentioned that the validity of the restriction laid upon the chancery courts is to be sustained independently of the positive command of the statute, on the ground that the courts would refrain from issuing injunctions in such cases even in the absence of a statute, in pursuance of the well-known rule of comity which prevents courts of concurrent and equal authority from interfering each with the jurisdiction of the other. The provision is comprehensive, and its inhibitory effect is operative against any injunction issued by the Federal courts against instituting or maintaining litigation in the State courts. An anxious desire to avoid friction between the courts is, therefore, not the only consideration which prompted the enactment of the law. It is a fact within the knowledge of all lawyers that where actual friction exists by reason of the Federal court having first taken cognizance of the controversy which brings about the litigation, it will protect the prior pendency by enjoining the parties from instituting conflicting proceedings in the State court. An instance where this was done is furnished in the well-known case of the Railway Company *v.* Julian, reported in 193 United States, and heretofore given a prominent place in the discussion conducted by the Senator from Wisconsin [Mr. SPOONER] and the Senator from North Carolina [Mr. OVERMAN]. The statute applies to many cases, and has been enforced in many cases where no conflict of jurisdiction was possible. In its last analysis it is a mere exercise of the legislative power to limit the remedies administered in courts of equity, and the processes by which those remedies are made effective.

As a second instance where Congress has exercised the right to deny to the chancery court the power to issue a writ of injunction I call attention to section 3224 of the Revised Statutes, which is as follows:

> SEC. 3224. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.
>
> FEDERAL TAXES SHALL NOT BE ENJOINED.

This statute was enacted May 27, 1872.

For eighty years of our history the Government was able to lay and collect taxes without finding it necessary to impose this restraint upon the courts, but in 1872 a condition became manifest which convinced Congress that it would be a wise exercise of its prerogative to take away from the courts of chancery the power to issue injunctions of this kind. The Senator from Wisconsin says that the right to issue an injunction or institute any other form of suit against the Government is a matter of grace, and that in extending permission to sue, it is competent for the sovereign to grant a qualified right or to deny entirely the right to sue; that it is of the highest importance to the sovereign that the taxes laid shall be collected, and that interference by the courts with such collection is not to be tolerated. He therefore argues that Congress could, by omitting to grant affirmative authority to bring a suit on any terms, and could thereby deprive the taxpayer of all judicial

remedy to litigate the validity of a tax; that what was done in the passage of section 3224 was really to enlarge the taxpayer's remedy by permitting him to apply in the first instance to the Commissioner of Internal Revenue for the return of the taxes exacted illegally from him, and in default of prompt action by the Commissioner be permitted to bring a suit at law. This contention is plausable, and it doubtless represents the opinion of the Senator from Wisconsin as to the reason why existing legislation was enacted. Admit all this, and it does not militate against the contention we are now making, that Congress has the power to judge for itself when and to what extent the right to issue a writ of injunction shall be denied. The inducements to the enactment of this section may be like those that prevailed in the enactment of section 720 in that they constitute good reasons and strong reasons why it should be done, but that Congress had power to pass the statute and that its validity has long been recognized and enforced by the courts is the pivotal fact with which I am now interested.

The Supreme Court of the United States, in the case of Shelton *v.* Platt (139 U. S., 592), indicates the reason why, in its judgment, legislation such as section 3224 was enacted, and it is somewhat different in nature from the opinion entertained by the Senator from Wisconsin. It is as follows:

> Legislation of this character has been called for by the embarrassments resulting from the improvident employment of the writ of injunction in arresting the collection of the public revenue; and, even in its absence, the strong arm of the court of chancery ought not to be interposed in that direction except where resort to that court is grounded upon the settled principles which govern its jurisdiction.

This explanation by the court, made at the time it was, represents the wide opportunities afforded by a survey by that great court of the whole judicial field of the United States, and a familiarity with the recklessness and want of care with which preliminary injunctions are usually issued. Whilst the Government was willing to still permit this practice to continue so far as the interests of private individuals are concerned, it manifested a purpose to provide a better remedy for itself.

This statute came under consideration by the Supreme Court in the case of Snyder *v.* Marks (109 U. S., 189). A citizen whose property was about to be seized for a tax levied under Federal authority, applied to the court for an injunction to restrain the officer from seizing his property, and sought to escape the force of section 3224 by alleging that the seizure was wholly unauthorized, because the tax was illegal, and in this connection contended that the courts were deprived of the right to issue an injunction only in cases where the tax itself was conceded to be lawful. The Supreme Court denied the validity of that contention, and said:

> The inhibition of section 3224 applied to all assessments of taxes made under color of their offices by internal-revenue officers charged with general jurisdiction of the subject of assessing taxes against tobacco manufacturers. The remedy of a suit to recover for the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy was given as exclusive, and no other remedy can be substituted for it.

It will be noted that the court does not decide that the right to sue to recover back the tax after the citizen's property has been seized and sold to satisfy the illegal tax is an adequate remedy. It simply says that the remedy is exclusive. There is quite a difference between an exclusive remedy and an adequate remedy. This distinction was made by the court understandingly and for the reason that in the light of its own decisions it could not have made the statement that the remedy by action to recover taxes illegally exacted was adequate. In Ogden City *v.* Armstrong (168 U. S.) the court says, in dealing with this particular question:

> It often happens, however, that the case is such that the person illegally taxed would suffer irremedial damage, or be subjected to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the taxpayer's lands, the loss of his *freehold by means of a tax sale would be a mischief hard to be remedied.* Even the cloud cast upon his title by a tax under which a sale could be made would be a grievance which would entitle him to go into a court of equity for relief.

The decision of the Supreme Court in the celebrated income-tax case, reported as Pollock *v.* Farmers' Loan and Trust Co. (157 U. S., 429), demonstrated moré forcibly than any argument that I can make that the Federal courts regard section 3224 as nothing more than a positive assertion of power by the legislature in restraint of the power of a court to issue an injunction, and that there does not lie at the foundation of the statute a principle which, considered independent of it, is broad enough to do without the statute the things that it requires to be done. In other words, a tender consideration for the revenues of the country and a desire to remit persons to the remedies enacted by statute which deny a resort to the ordinary equity powers of the courts is not an inherent principle or practice of courts of equity, but is conformed to as a submission to positive restraints imposed by the sovereign authority of Congress. In the income-tax case the court entertained a complaint in equity brought by a stockholder against the officers of the trust company, alleging that it was the purpose of those officers to make returns under the income-tax provision of the Wilson bill, and that after making these returns it was their purpose to pay the tax to the officers of the United States Government. It further alleged that this tax was void because the statute which sought to impose it was unconstitutional. Now, here was a case that involved a vast volume of taxation, levied on the wealth of the country, and it would have been a most admirable opportunity for the court to have said that this suit, although nominally between persons who stood in nowise in adversary relations, was really brought for the purpose of interfering with the collection of the public revenue, and, looking through the mere form in which the action was brought, the court could see that its main purpose was such as brought it within the prohibitory effect of section 3224. Instead of doing that, the court proceeded to entertain the suit on the ground that it did not fall within the letter of the statute and that the restraint upon the court was no greater than the terms of the statute specifically imposed. It proceeded to hear the case, and decided that the tax was invalid.

Mr. Justice White, in his dissenting opinion, urges very strongly the contention that the action of the majority of the court was a plain evasion of the statute, because the litigation, although nominally between private persons, was really directed against the authority of the Government to lay and collect the tax. But the majority of the court stood upon the letter of the statute.

Mr. SPOONER. Mr. Justice Harlan also dissented upon the same ground.

Mr. CLARKE of Arkansas. Mr. Justice Harlan also dissented, and for the same reason, among others. But the court disregarded the restraint of the statute for the reason that the case before the court did not fall within the letter of it. It was not technically a suit against any officer who was attempting to collect the tax. Of course, in this collateral way, the trust company elicited the judgment of the court on the validity of the tax.

Mr. SPOONER. That case was decided on the ground that the law was unconstitutional.

Mr. CLARKE of Arkansas. Yes.

Mr. SPOONER. In the early part of the opinion the court lays down the rule and cites several cases which show that the court has the power in certain cases——

Mr. CLARKE of Arkansas. That is exactly what I am insisting on; that you can not deprive the citizen of the right to resist the tax collector or anybody else in an effort to take from him his property wrongfully. While the court, in the Income Tax case, admitted that an injunction can not be brought against an officer attempting to collect a tax, it allowed the same thing to be done in an indirect way. A suit to restrain the collection of illegal taxes has over and again been held not to be a suit against the sovereignty, but against the officer, on the theory that he is doing something that he is not authorized by law to do, and that he can only represent the sovereignty when acting lawfully in her behalf.

In re Tyler (149 U. S., 190), a case that came up from South Carolina, the court, in speaking of the distinction between suing the State directly and suing an officer thereof who is seeking to perform an illegal act, says:

> The subject was but recently considered in Pennoyer *v.* McConnaughy (140 U. S., 1), in which Mr. Justice Lamar, delivering the opinion of the court, cites and reviews a large number of cases. The result was correctly stated to be that where a suit is brought against defendants who claim to act as officers of a State and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff to recover money or property in their hands unlawfully taken by them in behalf of the State; or for compensation for damages; or, in a proper case, for an injunction to prevent such wrong and injury; or for a mandamus in a like case to enforce the performance of a plain legal duty, purely ministerial, such suit is not, within the meaning of the amendment, an action against the State.

So I maintain that the restraint of this section is positive and represents the power of Congress to do what it purports to do. The decision in the Income Tax case shows how readily courts take advantage of the cases that lie without the letter of the statute, but are within its spirit, to do the things that they could not do in a case standing upon similar principles, but falling within the letter of the statute. It is the restraint of the statute, and not that of equitable principles, that prevents the courts from enjoining the officers of the National Government whenever a disputed tax is demanded. The court, in Shelton *v.* Platt, has indicated that it deemed the substituted remedy to be the exclusive remedy to which the taxpayer is entitled, but it does not state that it was an ade-

quate remedy. Nor could the court, as a matter of fact, have made any such declaration. Anybody, lawyer or layman, understands that where a citizen's property is levied upon, taken from his possession, and sold at a sacrifice at a public sale to satisfy an illegal demand made by the Government, which is charged with the duty of protecting his liberty and his property, that it is no adequate redress to send him to an official to receive back the amount of the tax illegally exacted from him, leaving him the loser by the loss and inconvenience of the deprivation of his property.

Mr. SPOONER. Will the Senator allow me a word?

The VICE-PRESIDENT. Does the Senator from Arkansas yield to the Senator from Wisconsin?

Mr. CLARKE of Arkansas. Yes, sir.

Mr. SPOONER. In the Nichols case, which the Senator will find cited, opposite the section 3224 itself, and from which I read the other day, the court puts it entirely on the ground that the Government will permit the collection of its revenues to be interrupted in any way by judicial proceedings; but it prescribes the conditions upon which such suit may be brought.

Mr. CLARKE of Arkansas. I am aware that the Supreme Court held in that case that the duty of a taxpayer, whose property had been seized to satisfy an illegal tax, was to pay the tax, and then apply to the officer of the Government for its refund. That was his exclusive remedy, but I insist that it was not an adequate remedy, and if the court intended to lay down the doctrine there that motives of high public policy, based upon the prompt collection of the public revenue, were the considerations which induced the court to refrain from interfering where the administrative collection of public revenues were involved, it lost a most admirable opportunity to have applied the doctrine in its perfection when it omitted to do so in the income-tax case, as I should like to say. No matter what the court may have said in the Nichols case, or in any other case, it is an outrage of the grossest character for the Government to authorize its officers to seize a citizen's property to pay a tax that it had no authority to levy, and then to advise him that he may reimburse himself for the loss by applying to certain officials for a return of the amount wrongfully exacted from him, denying to him all remedy to protect his possession and to raise the question of the validity of the seizure in advance of its being taken from him. And, then, after doing all this, an outcry is raised when an attempt is made to restrain courts from interfering with just as important an exercise of public authority in the matter of fixing the taxes upon the transportation interests of the country by a board specially selected and peculiarly well qualified to discharge the service.

I can not quite understand the arbitrary invasion in the one case and the tender solicitude for the interests involved in the other. If Congress can deny to a citizen all remedy to protect his possession when a seizure is made to satisfy an alleged tax, it would seem that such a remedy might be denied in any case without offending against the constitutional provision which provides that his property shall not be taken without due process of law. Under section 3224 the citizen's right in the abstract to defend his possession exists, but all remedy to make this right effective is taken away from him by the enactment of this section, as construed and sustained by the Supreme Court. A less effective remedy is provided, and in a case where the taking may be conceded to be wrongful. The fact that the pretext for the wrongful taking is to make certain the collection of the revenue does not alter the force of the principle. Congress has simply asserted its supreme power to say that as against an invasion of his property rights by an officer assuming to collect a tax, no preventive remedy shall be available to the citizen. This refusal is a mere exercise of power. That is what we contend for here. We justify its exercise here by considerations of wisdom and policy rarely to be found supporting such an appeal.

Mr. SPOONER. In the Income Tax case the situation was peculiar. That was not a suit against the tax collector; that was a suit brought by a stockholder of a corporation to restrain the corporation from voluntarily making returns under the income-tax act.

Mr. CLARKE of Arkansas. I am perfectly familiar with the facts, the character of relief sought, and the character of relief granted in that case. The allegation was made that the trust company was about to pay the tax. The object of the litigation was to prevent the payment of the tax, and it did prevent it. The statute says that no suit shall be brought against an officer for the purpose of arresting the payment of a tax. They worked out the same result by indirect methods, but they worked it out all the same. I assert again that when Congress denied to the taxpayer whose property was seized to satisfy an illegal tax, the most proper remedy for the protection of his possession, that it went far beyond anything we are now asking to be done. Before the enactment of section 3224 the taxpayer could, without infringing the sovereign's immunity from action, obtain an injunction against the officer who was threatening to seize his freehold. The principle upon which this was done is adverted to briefly in the extract that I gave a few minutes since in the case of In re Tyler (149 U. S.). The right to challenge the validity of taxes in this way is a matter of every-day occurrence, so far as State taxes are concerned, and there is scarcely a volume of the decisions of the Supreme Court of the United States for the past twenty years that does not contain a case where such a suit was maintained as not being a suit against the State. A similar objection was presented when the railroad commission cases began to make their appearance in the litigation of the country. It was urged in the Reagan case, in 154 United States. The court made the same disposition of it that had been done in the tax cases, justifying its action in so doing upon the broad proposition that a citizen had a right to protect not only the title to his property, but its possession. The distinction between an officer doing an illegal act and an officer doing a legal act was pointed out and maintained.

STATE COURT SHALL NOT ENJOIN NATIONAL BANK.

I now desire to call to the attention of the Senate the third instance in which Congress has denied to a court the right to issue a preliminary injunction, and in doing so I read part of section 5242 of the Revised Statutes. It is as follows:

SEC. 5242. * * * And no attachment, injunction, or execution shall be issued against such association (national bank) or its property before final judgment in any suit, action, or proceeding in any State, county, or municipal court.

The validity of this statute was established in the case of the Pacific National Bank *v.* Mixer (124 U. S., 721). The legality of an attachment issued by a State court against a national bank was the particular question submitted for adjudication, but as the statute which prohibited both attachment and preliminary injunction is the same, what was said by the court in disposing of the matter directly before it is applicable to the validity of the entire statute. The court held that the prohibition, in so far as the attachment was concerned, not only disabled the State court from issuing an attachment, but that by reason of the fact that attachments in the Federal courts are authorized only in cases provided for in State statutes, for the reason that the practice and procedure in the trial of law cases in Federal courts is the same as that which prevails in the State where the Federal court is sitting, it was held that as the Federal statute in effect so amended the State statute as to disable the State courts from issuing an attachment against the national banks, it took away from the Federal court the right to issue such an attachment. The court said that section 3224 likewise deprived the State courts of the power to issue injunctions. This the court expressly declared when it said:

It was further said that if the power of issuing attachments has been taken away from the State courts, so also is the power of issuing injunctions. This is true.

Now, if the right to issue a preliminary injunction pertains to the judicial power and is not a mere process, it will puzzle the wit of a wiser man than I am to know how it can be taken away from the State court by an act of Congress and that the same Congress can not take it away from a court created by it. It will not be maintained, and the contention sustained by sound principle or decisive authority, that Congress can take away from the State courts anything that it could not take away from the Federal courts.

I am aware that it is said that Congress could deprive the State courts entirely of the right to try a suit against a corporation created by national authority by simply providing an easy method of removal to the Federal courts. The Congress of the United States can enlarge the jurisdiction of the Federal courts so as to bring within it any class of cases described in the constitutional provision indicating extent to which jurisdiction can be conferred on Federal courts, but it has not seen proper to do so. On the contrary, Congress has conferred exclusive jurisdiction on the State courts in all cases by and against national banks where the sum or matter in dispute is of less value than $2,000, and in all cases it has placed such associations upon the same footing with corporations created by the State in which the bank is located and doing business. But it has denied to the courts the right to extend to litigants generally, and without exception or qualification, the right to have the benefit of the wholesome remedy of preliminary injunction. Some days since, in answer to a suggestion of the senior Senator from North Carolina, the Senator from Wisconsin instanced a case of excessive hardship, when he said that it would be a perversion of justice to deny to a citizen, whose negotiable promissory note had been obtained through fraud, the right to seize that note in the hand of a wrongdoer before he had indorsed the same to an innocent holder and had thereby

rendered absolute the liability of the maker. Now, this very thing can occur at the present day, if the holder of the note happens to be a national bank. The whole thing illustrates as strongly as any circumstances can that the right to deny the use of the process of preliminary injunction is a legislative matter and can be applied or withheld, according to the legislative judgment or whim. This statute came before the Supreme Court of the United States in a very recent case, that of Van Reed *v.* People's National Bank (198 U. S., 554). Its validity was affirmed, and the purpose of the court to enforce it was emphasized.

Judge Day, who delivered the opinion in the case, says that it is not only not affected by repeal or otherwise by any subsequent statute, but that it has been generally accepted and followed as the authoritative law by the courts of last resort of many of the States and by the inferior Federal courts. He cites cases wherein the validity of the statute has been affirmed and recognized from Massachusetts, Georgia, Minnesota, and Tennessee. The effect of this decision is to show that Congress has the power to take away from the court which is invested with exclusive jurisdiction of a large class of lawsuits the right to issue preliminary process either in the form of an attachment or preliminary injunction. It is a sheer exercise of power by Congress, which no judge or lawyer concerned in these cases ever questioned or denied.

It is altogether probable that the delicacy of the situation presented when the Supreme Court was called upon to consider the validity of a Congressional statute, taking away from a State court a part of its power, would have prompted the court on its own motion to have first determined the power of Congress to do such a thing.

INJUNCTION AN IMPORTANT PROCESS, BUT IS SUBJECT TO CONTROL BY CONGRESS.

The nature of the case raised the inquiry, and the character of the decision made shows that it was disposed of in favor of the power of Congress. I am greatly encouraged to assume with some confidence that in view of the fact that Congress has denied the right to resort to injunction proceedings in these three notable instances, and that its action in doing so has been so uniformly and emphatically sustained by the United States Supreme Court, that there is no longer any reason for saying that the authority in Congress does not exist. Its exercise in any given case is of course to be controlled by considerations of wisdom and policy. It is not to be arbitrarily done, nor done for the asking. The remedy by injunction is the outgrowth of the paramount obligation that rests upon courts to do justice, and the wholesome character of its aid in this direction vindicates its right to exist. I am not to be included in the number who would sacrifice it as a concession to the idle fear that some judge, into whose hands shall be committed the right to grant it, may abuse the power thus conferred upon him.

Notwithstanding I do not underestimate its importance as an agency in advancing the cause of justice, I believe there are instances where Congress should exercise its discretion to deny a resort to it.

The whole business of administering justice is confessedly imperfect. There are many instances where perfect justice is meted out, but there are many more where something short of a complete remedy is extended. This grows out of the fallibility and imperfection of human judgment and of the sagacity and industry of the wrongdoer. In this matter of making rates we take unusual care to provide for the employment of the very fairest class of men that can be found. A salary of $10,000 a year is provided, and a term of seven year duration is fixed. This ought to secure the service of persons as well qualified to understand the problems that are submitted for their consideration as a lesser salary will secure for service in the judicial branch of the Government. The membership of the Commission is fixed at seven, and they are supplied with all of the accessories necessary to complete mastery of the problems involved in the controversies submitted to them before they are called upon to decide. Any resort to the court to correct their work does not partake of the nature of an application to redress a wrong tortiously inflicted by a wrongdoer, but is rather in the nature of a plea for a second hearing of the questions which we must assume have been carefully and conscientiously decided by the Commission. My support of the proposition to deny the writ of preliminary injunction is therefore predicated upon the belief that the judicial investigation will be no more than a second hearing of a matter that has already been carefully and honestly considered. I believe that it would best effectuate the policy that lies behind this movement to invest the Interstate Commerce Commission with rate making power, to impose upon them such responsibilities as will sober their judgment and make them aware of the care and diligence with which they should discharge their duties. If the unlimited right of injunction is permitted, the Commission will inevitably assume that what they do is of a merely tentative character, and will become operative only when it meets the approval of the court. The railroad companies themselves will not fully develop before the Commission all of the testimony and arguments which make in favor of their own case, knowing that in the light of former experience they can make a very plausible appeal to the court, based upon the fact that what the court is asked to do is not to reverse the Commission, but to consider new developments which have been brought into the lawsuit, and which were not before the Commission.

I now repeat what I said a short time since. I do pretend that because Congress can constitutionally exercise a certain power therefore it should do so. The writ of injunction, both in its preliminary and permanent form, is a remedy of great and demonstrated efficiency, and it should not be dispensed with, in any case, except for reasons of the most convincing character. That these exist in this case I am persuaded beyond the necessity for further argument. I limit my insistence on this occasion, as I would do on every other application that is made to curtail the scope and effect of the writ of injunction, to the facts and circumstances that bear directly on this particular effort to circumscribe its use. I shall therefore proceed to enumerate briefly, without attempting to elaborate, the reasons which occur to me as justifying the adoption of the proposed amendment denying to the courts the right to issue a preliminary injunction to suspend the operation of the order of the Commission pending the final decree in the circuit court. These reasons are not of my own invention, but are based exclusively upon the peculiar nature of the official action to be assailed and on the principles and practices of the law, as these have been developed in the decision of kindred questions by the court of last resort.

Assuming power to deny right to issue preliminary injunction, six reasons why it should be done in this case:

FIRST. ISSUE OF WRIT IS WHOLLY DISCRETIONARY.

In the first place, the issue of a preliminary injunction is a matter that rests solely in the discretion of the judge to whom the application is made. Now, the principal argument made in opposition to the pending amendment is that when a constitutional right is threatened with invasion that the privilege of invoking a preliminary injunction for its protection is necessary to constitute due process of law, and that the denial of the writ in any case destroys the right indirectly by denying the proper remedy for its enforcement. I may say, in passing, that I do not concede that any more sacredness attaches to a right created by the Constitution than to one created by statute or in any other lawful way. The constitutional right has the one advantage that it is secured by a law that is not subject to legislative change. It is a lawful right, no more and no less. The scope and effect of it is the same as if it were created by a valid statute, and the remedies for its enforcement should be no greater or less. Judge Miller, in his dissenting opinion in Gelpoke *v.* Dubuque (1 Wall., 214), said on this subject:

> Where the construction of a constitution is brought to bear upon the question of property or no property, contract or no contract, I see no sound reason for any difference in the rules for determining the question.

But be that as it may, it is perfectly obvious that a remedy which may be given or withheld at the mere option of the judge to whom application is made is not the kind of a remedy that may be spoken of as part of a vested right. Rights are protected by positive remedies that the litigant is permitted to invoke as a matter of right, and that the court must grant as a matter of duty when proper proof is presented. Even if it were true that every right implies a remedy for its enforcement, and that the Congress has no discretion to prescribe the character of this remedy, the argument would not apply where the so-called remedy can be afforded or withheld at the whim or caprice of the judge, and his action in doing so will not partake of the judicial character to the extent that will warrant the appellate court in reviewing and reversing his actions if it appear that the discretion has been abused. This has in terms been decided by the Supreme Court, as will appear from the citations which I append.

In the case of Buffington *v.* Harvey (95 U. S., 100) it is said:

> The granting of a rehearing is always within the sound discretion of the court, and therefore granting or refusing it furnishes no ground for appeal. (Steines *v.* Franklin County, 14 Wall., 15.) The granting or dissolution of a temporary injunction stands on the same footing. The granting of a permanent injunction is part of the same decree and abides the fate of the decree itself.

In our practice there is, in point of fact, no such thing as a permanent injunction. It is included in the decree and becomes a part of the decree. It is called a permanent injunction because it gives injunctive relief.

In Russell *v.* Farley (105 U. S., 438) it is said:

It is a settled rule of the court of chancery, in acting on applications for injunctions, to regard the comparative injury which would be sustained by the defendant, if an injunction were granted, and by the complainant, if it were refused. (Kerr on Injunctions, 209, 210.) And if the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party, for the damage arising from the act of the court itself is *damnum absque injuria*, for which there is no redress except a decree for the costs of the suit, or, in a proper case, an action for malicious prosecution. To remedy this difficulty, the court, in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act. The power to impose such conditions is founded upon, and arises from, the *discretion* which the court has in such cases, *to grant or not to grant the injunction applied for*. It is a power inherent in the court, as a court of equity, and has been exercised from time immemorial.

SECOND. IT ASSAILS JUDGMENT OF SPECIAL TRIBUNAL.

The second reason which should impel Congress to deny the right to suspend the orders of the Commission in advance of demonstrated invalidity is that the application is in its nature a collateral attack on the judgment of a special tribunal, created by law to determine a given state of facts. The rule in such cases is that the determination of the tribunal is to be respected as the decision and judgment of a special court, and its findings are to set aside only when it is made apparent that the erroneous character of its action is so pronounced as to raise a presumption that it acted fraudulently. This rule has been declared in cases where a single person constituted the tribunal, and in a notable case where three persons constituted that tribunal, and in many cases where the tribunal was composed of persons who were vested with authority to act very largely upon their own judgment, informed by such investigation as to matters of fact as they might see proper to institute on their own motion. The plan upon which the Interstate Commerce Commission is to be organized will invest it with a dignity and confer upon it authority that should exclude the possibility of mere wrongdoing and minimize the probabilities of gross error. The round salary and long term will attract men of the first order of ability and character, and the liberal provisions made for supplying the accessories of counsel and masters at least puts into its hands the means of acquiring full and reliable information. That the President will make judicious selections of its membership and that the Senate will act with fairness and independence in confirming their appointment is a presumption that ought to be indulged. If, however, there is no ground for assuming that a commission so selected can be trusted to deal with the subject-matter committed to it in a way that will entitle its completed work to be respected until it is shown, on issue joined, to be wrong to an extent that honest men will not differ about its being so—and that is the rule of invalidity laid down by the Supreme Court in dealing with similar questions—then this furnishes a good reason why the Commission should not be created at all. A commission constituted as this one should be ought to be able to discharge its duties in such a way as to command respect until error is affirmatively shown.

Mr. BEVERIDGE. Mr. President——

The VICE-PRESIDENT. Does the Senator from Arkansas yield to the Senator from Indiana?

Mr. CLARKE of Arkansas. Certainly.

Mr. BEVERIDGE. Does not the Senator think that for these very reasons a court would be very slow indeed to issue a preliminary injunction against rates fixed by such a commission?

Mr. CLARKE of Arkansas. I have not any information derived from my experience and observation that justifies me in saying that courts are under any circumstances very slow to issue injunctions where large interests are involved. I think they are very swift.

Mr. BEVERIDGE. If the Senator will pardon me, I do not think that general answer is an answer to my question. Whether they are swift or not, they sometimes can not be, as we all know, too swift. But the Senator gave some excellent reasons why a rate fixed after wide investigation and mature deliberation by a commission would be very likely to be a correct rate. Does not the Senator think that as a practical matter a court would be very slow indeed to suspend that rate by a preliminary injunction?

Mr. CLARKE of Arkansas. I would not have any reason for saying so, based on my experience with the books and from actual observation. I think the first requisite of a railroad lawyer is to be able to draw offhand a bill of complaint showing that any law or official action interfering with the plans of the carrier invades its constitutional rights. If he can not do that, they would not have him around as an office boy.

In commenting on the respect due to the findings of a special tribunal, Judge Brewer, in delivering the opinion in Pittsburg, etc., Company *v.* Backus (154 U. S., 434), says:

Whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts it can not be overthrown by evidence going only to show that the fact was otherwise than as so found and determined. Here the question determined by the State board was the value of certain property.

Just as here they determine the value of certain service.

That determination can not be overthrown by the testimony of two or three witnesses that the valuation was other than that fixed by the board.

The board had increased the valuation from $8,000,000 to $22,000,000.

It is true such testimony may be competent, and was received in this case because, taken in conjunction with other testimony, it might establish fraudulent conduct on the part of the board sufficient to vitiate its determination. It is not, however, contended by counsel that there was any actual fraud on the part of that board.

The same doctrine was declared in the United States *v.* California Land Company (148 U. S., p. 43).

Also in the case of French *v.* Fyan (93 U. S., 170).

So it is plain that we are not dealing with a situation where the right of an individual has been tortiously invaded, or deemed to be tortiously invaded, by another, but we are protecting from inconsiderate assault the completed work of a very carefully organized Commission, composed of able and conscientious men, and it should have the presumption of verity accorded to it. It ought not to be sent out by the Congress that authorizes its existence with a statutory badge of suspicion of wrongdoing and an invitation to attack.

THIRD. PARTY SEEKING CAN NOT BE COMPELLED TO DO EQUITY.

The third reason why I think Congress is warranted in denying the right to apply for a preliminary injunction is based on the fact that the nature of the litigation deprives the court of the correlative power to so mold its order as to do justice to all parties interested in the litigation. It can not apply its favorite maxim of requiring those who enter its portals to come with clean hands, and, while asking for equity, agree to do equity. The Supreme Court of the United States has fixed the limit of the judicial power to interfere with the orders of a railway commission in the matter of fixing rates at the point of determining whether or not the entire body of rates will yield a sufficient fund to satisfy the carrier's constitutional right to just compensation for the use of its property in the public service of transportation. The court will look to the action of the Commission for this single purpose, and if it finds that it is wanting in ever so small a degree in satisfying the constitutional right to just compensation, it will nullify the entire proceeding of the Commission. The court will not assume to modify the rate by increasing it to a point that will satisfy the carrier's constitutional right. On the other hand, it may affirmatively appear that the rate fixed by the carrier is in excess of what it should be, and yet the court is without power to require the abatement of any part of it pending a final disposition of the case. This feature is not involved in the litigation. The litigation concerns the validity of the Commission's order. The only thing the court can do is to condemn the Commission's rate entirely or permit it to stand as a whole. The court has no power of apportionment. The principal consideration which makes the right to issue a preliminary injunction tolerable and equitable is the power of the chancellor to impose terms that will come as near protecting the rights of all concerned as human intelligence and conscience will permit, as is manifest from the extract I read a short while ago from Russell *v.* Farley (150 U. S.). For the purpose of showing the extent and character of the relief granted by the court in these railroad-commission cases when the validity of a rate-making order is called in question, I read from Judge Brewer's opinion in Reagan *v.* Trust Company (154 U. S.):

It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed nor the limit of judicial inquiry altered because the legislature, instead of the carrier, prescribes the rates. The courts are not authorized to reverse or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruc-

tion to rights of preporty, and if found so to be, to restrain its operation.

* * * * * * *

The challenge in this case is of the tariff as a whole, and not of any particular rate upon any single class of goods. As we have seen, it is not the function of the courts to establish a schedule of rates. It is not, therefore, within our power to prepare a new schedule or rearrange this. Our inquiry is limited to the effect of the tariff as a whole, including therein the rates prescribed for all the several classes of goods, and the decree must either condemn or sustain this act of quasi legislation. If a law be adjudged invalid, the court may not in the decree attempt to enact a law upon the same subject which shall be obnoxious to no legal objection. It stops with simply passing its judgment on the validity of the act before it. The same rule obtains in a case like this.

I also read from the opinion in Pittsburg Railway Company *v.* Board of Public Works (172 U. S.):

One of the reasons why a court should not thus interfere as it would in any transaction between individuals is that it has no power to apportion the tax or to make a new assessment, or to direct another to be made by the proper officers of the State. These officers, and the manner in which they shall exercise their functions, are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise, by the constitutions of all the States and by the theory of our English origin, is exclusively legislative. A court of equity is, therefore, hampered in the exercise of its jurisdiction by the necessity of enjoining the tax complained of, in whole or in part, without any power of doing complete justice by making, or causing to be made, a new assessment on any principle it may decide to be the right one. In this manner it may, by enjoining the levy, enable the complainant to escape wholly the tax for the period of time complained of, though it be obvious that he ought to pay a tax if imposed in the proper manner.

It is an inflexible rule of equity jurisprudence that unless the court can see that it can render a decree that will afford to all parties in interest complete justice it will decline to interpose at all, leaving the parties to such remedies as may be afforded by other courts. Applying that principle here, the court ought not to grant a preliminary injunction in cases of this kind, because by doing so the excessive rates charged by the carrier must be the measure of the shipper's liability pending the litigation, notwithstanding it may on final hearing turn out that the Commission rate was lawfully made.

Mr. SPOONER. Will the Senator from Arkansas allow me to ask him a question?

Mr. CLARKE of Arkansas. Certainly.

Mr. SPOONER. Has the Senator any doubt of the power of a court granting a preliminary injunction in a case where it is apparent to the court that it should be granted to prevent irremediable loss to grant it upon terms to be fixed by the court?

Mr. CLARKE of Arkansas. I think the court could grant a preliminary injunction on any terms that will be consistent with the relief it could include in its final decree.

Mr. SPOONER. Could not a court require every dollar of money collected by the railway company under the order representing the difference between the rate fixed by the Commission and the rate collected to be deposited in the court to await the final result?

Mr. CLARKE of Arkansas. You mean to appoint a collector to do that?

Mr. SPOONER. To require the party to pay into the court every dollar collected in excess of the rate fixed by the Commission, to be held in the registry of the court, subject to the order of the court to abide the result of the litigation?

Mr. CLARKE of Arkansas. As a mere abstract question of power the court might make such an order, but it would be attended by so many practical difficulties I am quite satisfied the court would never undertake to do the collecting and reporting.

Mr. SPOONER. Could not the court require the carrier to present with each payment the name of the person from whom collected and the point from which it was collected?

Mr. CLARKE of Arkansas. I suppose it could appoint an auditor or collector to stand at every station door and collect the money, but the courts have not done that in the case of ordinary taxation.

Mr. SPOONER. The court is not impotent in such respects.

Mr. CLARKE of Arkansas. It is fettered with so many difficulties that I will say, in a general way, the court will never make such an order, because the integrity of the return depends entirely upon the integrity of the litigant. It puts it in the hands of the litigant to say how much is collected and how much shall be turned over. The court would never know whether the order had been complied with or not. The people who collect the money, the station agents, would report if they saw proper. I do not think any court has ever made an order of that kind where the efficiency and integrity of its enforcement was so completely under the control of the party whose wrongful and oppressive conduct is primarily the cause of the litigation. But, then, such an order as that would not do justice if the court should make it. That would only enrich the shipper at the expense of the consumer and the producer. The real owner of the money never would get it back. It would be better to put it in the Treasury. Then the taxpayers would get the benefit of it, as it would be used for public purposes. There is no justice in returning it to the shipper. He has not, in fact, paid a dollar of it. The shipper has not been damnified in a single cent. The shipper deducts the freight rates he is to pay from the price paid for the product to be carried, or adds it to the price when sold to the consumer.

FOURTH. COURT HAS NO OPPORTUNITY TO MAKE NECESSARY EXAMINATION.

The fourth objection to the justice of allowing a preliminary injunction to issue in cases of this kind is found in the numerous and complicated facts and computations that are to be considered before an intelligent judgment can be arrived at. A preliminary injunction issued without an intelligent and definite knowledge of the scope and effect of the litigation, is a mere matter of guesswork, and this ought never to be tolerated when the judgment of a respected tribunal concerning a public matter is to be made the point of attack. The practical force of this objection will appear more plainly by reference to a case decided by the Supreme Court of the United States, where the decree of the United States circuit court was reversed principally upon the ground that the judge in the lower court had made the computations and findings by his own efforts and without the aid of a master. Judge Brewer, in writing the opinion of the court in the case of the Chicago Railway *v.* Tompkins (176 U. S., 169), comments on this practice, as follows:

It would doubtless be within the competency of this court on an appeal in equity to do this—

That is, to examine all the testimony—

but we are constrained to think that it would not (particularly in a case like the present) be the *proper course to pursue*. This is an appellate court, and parties have a right to a determination of the facts in the first instance by the trial court. Doubtless if such determination is challenged on appeal, it becomes our duty to examine the testimony and see if it sustains the findings, but if the facts found are not challenged by either party, then this court need not go beyond its ordinary appellate duty of considering whether such facts justified the decree. We think this is one of those cases in which it is especially important that there should be a full and clear finding of the facts by the trial court. The questions are difficult, the interests are vast, and therefore the aid of the trial court should be had. The writer of this opinion appreciates the difficulties which attend a trial court in a case like this.

In Smyth *v.* Ames, supra, a similar case, he, as circuit judge presiding in the circuit court of Nebraska, undertook the work of examining the testimony, making computations, and finding the facts. It was very laborious and took several weeks. It was a work which really ought to have been done by a master. Very likely the practice pursued by him induced the trial judge in this case to personally examine the testimony and make the findings. We are all of opinion that a better practice is to refer the testimony to some competent master to make all needed computations and find fully the facts. It is hardly necessary to observe that, in view of the difficulties and importance of such a case, it is imperative that the most competent and reliable master, general or special, should be selected, for it is not a light matter to interfere with the legislation of a State in respect to the prescribing of rates nor a light matter to permit such legislation to wreck large property interests.

We are aware that the findings made by the master may be challenged when presented to the trial judge for consideration, and it may become its duty to examine the testimony to see whether those findings are sustained, as likewise, if sustained by the trial court, it may become our duty to examine the testimony for the same purpose. But before we are called upon to make such examination we think we are entitled to have the benefit of the services of a competent master and an approval of his findings by the trial court. As we have said, those findings may not be challenged by either party, and if so, a large burden will be taken from the appellate court.

For these reasons we not merely reverse the decree of the trial court, but also remand the case to that court with instructions to refer the case to some competent master to report fully the facts, and to proceed upon such report as equity shall require.

Now, if a judge, after considering all the evidence offered by both parties, hearing the arguments of counsel, and having taken weeks to work out a result deliberately, can not render an intelligent final decree, what hope is there that it can do justice upon the partisan allegations of the bill of complaint, supported by *ex parte* affidavits, and issue a preliminary injunction? If the appellate court will not permit such work to be done in person by a judge in the lower court, who devotes weeks to making the examination and computations necessary to enable him to intelligently render a final decree, on the ground that the service to be performed is such as to require more care and labor than the judge is capable of bestowing, then what foundation is there for saying that he may temporarily grant, with the scant consideration usual in such cases, the same relief that the Supreme Court declares him, unaided, incapable of extending intelligently when he comes to announce his final decree?

The litigation in Railroad *v.* Tompkins related to a rate fixed by the State commission of South Dakota. The estimated division of the commerce of the country is one-fifth State commerce and four-fifths interstate commerce. If the court felt justified in making the observation it did in connection with a controversy that related to rate making in one of the smaller

States of the Union, how much more difficult will the task be when the larger volume of interstate commerce is drawn in question? It is perfectly plain that any examination that a judge can give on the mere application for a preliminary injunction will not carry with it authoritatively that extent and character of intelligent judicial condemnation that should be required to overturn even temporarily the work of the Commission. The deliberate findings of that Commission ought not to be overturned by the partial examination which the court or judge will make when granting a preliminary injunction.

The opinion of the court in the Tompkins case was written by Judge Brewer, who served as United States circuit judge for many years on the largest circuit in the United States, located in the northwestern section of the country, where controversies affecting public carriers were more numerous and more intelligently supported and assailed than in nearly any other section of the Union. In the development and advancement of the law to its present condition, Judge Brewer has not only been a pioneer, but a veteran. He has brought to bear upon that complicated question all the powers of his great intellect and his superb qualities of a farseeing statesman. If the pending bill shall become a law, and shall eventually be the means of applying a remedy to any of the abuses against which it is nominally directed, it will owe much to the formative aid of that courageous and sagacious judge in enforcing the equity of its purpose and spirit, rather than its scant and defective phraseology.

FIFTH. COURT CAN NOT PROTECT REAL PARTY IN INTEREST.

There is a fifth reason why I deem it to be the duty of Congress to prohibit the issue of a preliminary injunction to suspend the order of a Commission, that is as strong in its equities as any that can be mentioned, and if none other existed would be sufficient to justify the denial asked for. It is obvious that if the Commission rate is enjoined pending the trial that the carrier will continue to charge the rate fixed by itself. The shipper of freight is usually a middleman, or mere dealer in commodities that he causes to be transported from one point to another. In some instances he deducts from the price to be paid for products bought by him the freight rate necessary to transport his purchases to the place at which he expects to market them. In instances where the shipper is a jobber or distributer of products, he adds the freight paid to the price of the commodity, and thus fixes the price that the consumer must pay.

If it should turn out that the commission rate was wrongfully enjoined, payment to the shipper would in nine cases out of ten enable him to reap where he had really never sown. The real loser is either the producer or the consumer. These unrepresented classes should be protected if it is possible to do so, and if it seems utterly impracticable to do so, the court should not be allowed to pursue a course where their loss would be inevitable, without any hope of recoupment, directly or indirectly. If it shall turn out that the commission rate is too low, the carrier is not without remedy pending the litigation, since it may bring a practical demonstration of this fact to the notice of the Commission, which body is invested with authority to modify the rates fixed by it; and if in the end it shall turn out that the rate is too low and a deficiency in the income of the revenues of the carrier is thereby produced, it would not be an arbitrary and unwarranted exercise of discretion on the part of the Commission to allow such increase in the rates as would reimburse the carrier for the loss that had been imposed upon it by the action of the Commission itself. This matter of considering the rights of interested and unrepresented parties is a well-known principle in equity jurisprudence. The recent case of Beasley *v.* The Texas and Pacific Railway Company, 191 U. S., 498, is a case that amply presents this feature. The railway commission of the State of Louisiana had directed the railway company to erect a depot at a certain place 3½ miles distant from an existing station. Persons interested in the existing station sought an injunction against the railway company to prohibit it from complying with the order of the commission. It appeared in the progress of the trial that the railway company was perfectly willing for the injunction to issue, so that, in fact, the nominal parties to the litigation were in agreement as to the outcome desired. In denying the injunction, Judge Holmes said that it was one of the cases where public policy demanded that the rights of the unrepresented should not be ignored, and that the relief should be denied because of the inability of the court to protect their interest otherwise. Judge Holmes said:

> It is objected that the foregoing was not the ground of the demurrer. But, as was observed by the court below, other grounds are open on demurrer *ore tenus*, and apart from that consideration, if it appears that an injunction would be against public policy, the court properly may refuse to be made an instrument for such a result, whatever the pleadings. The defendant may desire the relief to be granted—

That is, in case the railroad company may desire to be successfully enjoined from building the depot—

> It is suggested that it does. But the very meaning of public policy is the interest of others than the parties, and that interest is not to be at the mercy of the defendant alone.

SIXTH. MOTIVE FOR DELAY REMOVED FROM RAILROAD AND MOTIVE FOR DILIGENCE FURNISHED.

As promptness in decision is secondary only to correctness of decision, there is a sixth ground for denying to the courts the right to issue a preliminary injunction that must not be overlooked nor its importance minimized. The very fact that the Commission's work is to become operative for a time without the scrutiny and support of the court will impress upon the Commission a sense of fairness and conservatism that will be very wholesome. On the other hand, the railroad company, being made aware of the fact that no unfair advantage is to be gained by delaying the final hearing, will be invested with the very strongest motives for accelerating the trial in every possible way. In the first place, the railroad company, knowing that the Commission's rate must become operative for a time, at least, will make a full and frank showing before the Commission, and thereby in many cases obviate the necessity of a resort to court, and this must be so unless we are to assume that the attitude of the Commission is to be habitually antagonistic to the railroad interest and that everything it does is to be dictated by a partisan and oppressive spirit toward the carriers.

The circumstance that the rate will, by very force of the statute, expire and become inoperative in two years is a strong reason why Congress should remove from the carrier all motive for delay, since it is common knowledge among those whose business it is to be familiar with the course of procedure in courts that it is a rare case that can be originated in the circuit court and finally disposed of in the Supreme Court within a period of two years. It is a practical impossibility to do this if either party is anxious to avail himself of the law's delays.

I will now direct the attention of the Senate to what I conceive to be its duty and power in the matter of providing for a judicial review of the action of the Commission in fixing rates under the delegation of power to it for that purpose. I have heard so much in the course of this discussion about a broad review by the courts of the action of the Commission and about a narrow review of its action that I felt interested to ascertain which of these was preferable and what my duty in this connection required me to do. I had a sort of surface impression, in the absence of an examination of the authorities, that as the work of the Commission was done by way of substitution for Congress itself that its action must partake of the immunity from judicial interference that inherently pertains to a legislative act or acts. As a result of such limited and imperfect examination, as all such work done by me must be, I have reached the conclusion, firmly and clearly, that Congress has no real power in connection with the matter. The only judicial feature of a rate-fixing order of the Commission is as to whether or not the constitutional right of the carrier to just compensation for the use of its property has been respected. If the rate fixed affords a revenue that will satisfy this demand, then the courts are without power to interfere. Speaking for myself alone, I would just as soon the senior Senator from Rhode Island [Mr. ALDRICH] should write the review provision to be incorporated in this bill, if one is to be so incorporated, as to write it myself. I would not provide for any review, while he would require everything the Commission does, and every phase of its action, to be subjected to the consideration of the courts, and he may logically and consistently do this, since he maintains that this whole business is an infamous proposition.

Mr. ALDRICH. Mr. President——

The VICE-PRESIDENT. Does the Senator from Arkansas yield to the Senator from Rhode Island?

Mr. CLARKE of Arkansas. Certainly.

Mr. ALDRICH. I know the Senator does not mean to misrepresent me.

Mr. CLARKE of Arkansas. Oh, no.

Mr. ALDRICH. I said the proposition to make the decision of the Commission final, without any possible chance to have the rights of the parties litigated or maintained by the courts, was an infamous proposition. I do not understand that the Senator from Arkansas or anybody else at this day is contending for any such proposition.

Mr. CLARKE of Arkansas. I am not contending that I can do it, but I will say that I should like to do so. When you denounce that contention as an infamous proposition you denounce a position assumed and earnestly defended by Justices Bradley, Gray, and Lamar, in the dissenting opinion in the case of Railroad *v.* Minnesota (134 U. S., 460), for these judges insisted that, under the law, the Commission rate should be entirely free from judicial interference or control.

Mr. ALDRICH. That is from the legal standpoint. I was not discussing it from the legal standpoint, but from the ethical standpoint.

Mr. CLARKE of Arkansas. I think that if it be true that the President can not select seven railroad commissioners who possess sufficient character and ability to properly discharge the duty of prescribing railway rates without the necessity for submitting its action to the revision of the court for any purpose, other than to protect the constitutional rights of the carrier to just compensation, I should consider the circumstance to be a very strong argument against creating a commission at all.

Mr. ALDRICH. Then, I understand the Senator would be glad to make the decision of a political body upon the question of rates throughout the United States final if he could?

Mr. CLARKE of Arkansas. I would, in order to do so, constitute the Commission somewhat differently from the Commission proposed in this bill. I would confine their proceedings and power as largely as practicable to that of an organized judicial court and have an entirely distinct bureau to originate and prosecute the partisan aspect of the inquiry. I would invest it with the dignity, power, and responsibility of a court as largely as I could, and keep away from its members all the lobbying influences that frequently infest legislative and administrative bodies.

Mr. ALDRICH. The Senator is promptly running away from the question I asked him. I asked him whether he would be glad to make the decisions of this board, a political board, to be appointed and removed by the President at will, final.

Mr. CLARKE of Arkansas. That is what lawyers call an abstract question. There is no possibility of it. As the law is established, there is no power in Congress to make the orders of the Commission impervious to judicial assault when the carrier's constitutional right to just compensation is invaded.

Mr. ALDRICH. The Senator was saying what he would like to do.

Mr. CLARKE of Arkansas. I should not hesitate to create a commission and invest it with power to finally dispose of this business of rate making. But in doing so, I should select and equip the Commission in such a way as to give to its proceedings and decision such manifest fairness as to relieve these from every criticism that affected their fairness, save such as might arise from errors honestly made. No tribunal composed of merely human beings can escape the possibility of these, nor would I degrade the Commission into a mere figurehead to escape the fear that something of this kind might happen.

Mr. ALDRICH. The Senator would like to appoint the Commission, I suppose?

Mr. CLARKE of Arkansas. Not necessarily so. But if it were my duty to do so, I think I could select a commission that would do justice according to my idea of justice. Any officer competent in character himself, and endowed with sufficient knowledge of men to select judges to review the work of the Commission when completed, ought to be able to select a competent commission. I would not allow any commission to originate complaints and try them, and then make their action final. I would provide a bureau or force of attorneys to originate and prosecute complaints, limiting the power of the Commission to impartial judgment. I would not allow them to be personally approached and solicited by railroad men and subjected to all sorts of lobbying influences, as legislative and administrative bodies sometimes are. I would invest them with the same dignity as our courts and judges, and protect them by a public opinion that will make it improper to deal with them except in the public and fair presentation of matters to be considered by them.

Mr. ALDRICH. Then the Senator is not entirely pleased with the proposition to make this Commission prosecutors and judges and executors?

Mr. CLARKE of Arkansas. No; I am not at all pleased with the bill. I can make a better bill than this, in my humble opinion.

Mr. ALDRICH. I hope the Senator will offer some amendment before the discussion is over.

Mr. CLARKE of Arkansas. I would offer a new bill, and I would offer one that would effectually put the railroads in the business of hauling freight and passengers through the country, and out of the business of hauling fictitious bonds and watered stock through Wall street. I would confine the carriers to the discharge of their duties as public carriers, in the exercise of powers and rights that they can not enjoy for a single hour without public permission. But I should give them a fair return for doing it; and not only that, but pay them liberally for doing it, and to an extent that would furnish encouragement to build new railroads through Arkansas and all the western country, where others are needed beyond what is now there. I would not grind them down to any petty and precarious return on the real value of the property employed in the service of the public.

Mr. ALDRICH. How much does the Senator think they ought to pay in Arkansas in the way of dividends?

Mr. CLARKE of Arkansas. I would fix the sum at about 6 per cent.

Mr. ALDRICH. Would the Senator make that rule apply to the country at large?

Mr. BEVERIDGE. Based on investments?

Mr. CLARKE of Arkansas. No; on the actual value of the property at the time it is being employed in the service of the public.

Mr. ALDRICH. Without regard to the stocks and bonds outstanding?

Mr. CLARKE of Arkansas. I do not think that the condition of the stock and bond floatation of any railroad has a controlling influence as to what is a just compensation to the carrier for the use of its property by the public. The Supreme Court says that the basis of computation is the value of the property, not the extent of its debts nor the number of its stockholders, at the time the property is so employed, that is to control.

Mr. ALDRICH. I presume the railroads of Arkansas never issued securities improperly?

Mr. CLARKE of Arkansas. I am not making any particular complaint against, nor warfare on, the railroads of Arkansas or the railroads of the country. They are all about alike. I do not attach personal blame to the railroad men of Arkansas or the railroad men of the country for anything they are doing. They are simply doing the things the law permits them to do, and probably as I would do under the same circumstances.

Mr. ALDRICH. I am very glad to hear the liberal views of the Senator from Arkansas as to the amount of dividends to be paid. The average dividend paid in the United States is in the neighborhood of 4 per cent.

BASIS OF ADJUSTING JUST AND REASONABLE RATE.

Mr. CLARKE of Arkansas. The railroads are capitalized at an average valuation of $63,000 per mile. Official investigations made in three of the leading States, and in which investigation the railways had a right to take part, showed that for $25,000 per mile the railways there could be replaced and put in operation.

Mr. ALDRICH. Twenty-five thousand dollars a mile might build a railroad in Arkansas, but it would not in New York.

Mr. CLARKE of Arkansas. I am sure the railroads in Arkansas are as well equipped as those anywhere. I see no good reason why $25,000 per mile would not build a railroad anywhere, where the conditions were not exceptional.

Mr. ALDRICH. You have good railroads; but it costs a good deal more for the right of way to build a railroad in the East.

Mr. CLARKE of Arkansas. That may be true, but the territory embraced in the calculation is so wide that in reaching an average valuation of $25,000 a mile so many inferior roads are included at that rate without being worth so much that a wide margin remains to make up the deficiency of the estimate when the good ones are considered.

Mr. ALDRICH. A railroad might be built in sparsely settled regions of Arkansas if there were good grades for probably fifteen or twenty thousand dollars a mile, while in the mountain regions of Colorado and in some places in the East where the right of way is extremely expensive $150,000 a mile would be a very moderate sum.

Mr. CLARKE of Arkansas. That is very true. I have not any doubt that there are a few cases of that kind. I presume, however, that such situations could be fairly adjusted. I would have a system so completely adjustable that justice could be done to every particular enterprise. I would have it understood where the cost of construction was $150,000 a mile that owners should have a fair return upon their expenditure, but I would want to be first advised as to the cost of the railroad and of the fact that the amount had been really invested in the railroad. I would not accept the bond and stock flotations which represent the concreted evidences of the whole system of abuses, of extortion and discrimination practiced upon the public who patronize the railroads, as conclusive evidence that this sum had been so invested. I would deal fairly and liberally with the railroad companies. I do not believe in any parsimonious policy or in the inauguration of unjust warfare against the railroads of the country. We can not get along without them, but we ought to understand how much liberality we are extending to them, and not make them the sole account keepers of the whole business.

Mr. BEVERIDGE. Mr. President——

The VICE-PRESIDENT. Does the Senator from Arkansas yield to the Senator from Indiana?

Mr. CLARKE of Arkansas. Certainly.

Mr. BEVERIDGE. I am very much interested in the Senator's argument, and I wish to ask him if he has thought of any method by which the railroads can be brought down to their actual value?

Mr. CLARKE of Arkansas. I should say that can be done just as satisfactorily as you can can estimate just compensation for rights of way and other similar things. Just compensation is a matter of market value; it is very largely a matter of opinion. The Constitution does not actually mean "just compensation," because that is an unknown standard—that is to say, it is a variable standard—it depends upon the judgment of a jury, board, commission, or court that decides the particular case. The witnesses who are called upon to testify, the skill of the lawyer, and many other things enter into it. I have heard of cases where equal undivided interests in the same tract of land have been differently valued by different juries where separate trials were necessary. I should say there was a way of finding that out. If the investigation should be conducted in good faith, I would not undertake to say that every doubt should be resolved against the railroads. In regard to the amount of income or wherever it was doubtful as to what the railroad cost, I would give proper weight to the representations made by the railroad company itself and those who represent it as to its value.

Mr. BEVERIDGE. How would the Senator——

The VICE-PRESIDENT. Does the Senator from Arkansas yield to the Senator from Indiana?

Mr. CLARKE of Arkansas. With pleasure.

Mr. BEVERIDGE. How would the Senator from Arkansas reduce this improper overcapitalization? I think every student of this subject concedes that this is perhaps the most critical question in the whole series of questions—this overcapitalization issued and absorbed by the public more or less innocently. I addressed the same question the other day to the Senator from Wisconsin [Mr. LA FOLLETTE] as to how this improper overcapitalization, which is absorbed by the innocent public and held by them, can be reduced. That it ought to be reduced I suppose every man will concede; but how does the Senator propose to do that? I think the man who solves that problem will have won for himself fame that will almost amount to immortality.

Mr. CLARKE of Arkansas. I can get along on a great deal less than that.

Mr. BEVERIDGE. But how would the Senator reduce it? I am very much interested in that question.

Mr. CLARKE of Arkansas. I would adopt for myself the doctrine of the Supreme Court, that the carrier shall be entitled to a fair compensation on the value of his property used in the service of the public, and at the time it is being so used, and then I should let the overcapitalization take care of itself. I would put upon that part of the public who are patrons of the road a tax that would produce just compensation to the carrier, and base this upon the actual value of the property used, and I would not further tax the patrons to raise an additional fund to enable the companies to declare dividends on watered stock and to pay interest on fictitious bonds. That will be a matter for the carrier, and the so-called "innocent investors" will have to look out for themselves. The rule of caveat emptor applies to these.

WHAT TO DO WITH WATERED STOCKS AND BONDS.

Mr. BEVERIDGE. Mr. President, I do not wish the Senator to understand that I am in any sense by these questions defending overcapitalization. On the contrary, I am quite in sympathy with the Senator's stand that there should not be any overcapitalization; but I call the Senator's attention to the fact that when I also asked the Senator from Wisconsin the other day in regard to it, he made the same answer, and I have thought about it since. If you charge a rate which will produce a proper dividend upon the actual investment, and, as the Senator from Wisconsin the other day stated, let the overcapitalization take care of itself, this income will have to be distributed among the stockholders alike and among all the stock alike, both that which is proper capitalization and that which is overcapitalization. Where, then, would you make the dividing line and pay to the holders of stock who held proper stock a proper dividend and to those who hold watered stock no dividend? I should be very glad to hear the Senator's opinion upon that.

I say again that I am quite in sympathy with the idea that there should not be any overcapitalization nor any dividends, if possible, paid upon a single share of watered stock; but in the distribution of the dividends how will we differentiate the stock which represents a just valuation of the railroad from the stock which represents water?

Mr. CLARKE of Arkansas. In the first place, there are very few innocent holders of railroad stock. There may be such holders of railroad bonds.

Mr. BEVERIDGE. But suppose there are a thousand stockholders and that one is an innocent holder; while 999 are not innocent holders, you would have to distribute the income among all of them. How would you determine what was watered stock and what portion of the stock represented the exact actual investment?

Mr. CLARKE of Arkansas. That would be a matter for each stockholder to determine for himself before he bought the stock, whether or not he was buying stock in an enterprise that had been overcapitalized.

Mr. BEVERIDGE. I am not talking about the man who bought watered stock, but I am talking about the man who bought stock representing actual value before the watered stock was issued. After the income derived from the operation of the roads is in its treasury and the expenses are paid the excess must be distributed in the form of dividends among the stockholders, unless there is some provision to the contrary in the stock itself.

Mr. CLARKE of Arkansas. The Senator describes a condition that very rarely exists, as I think. There may be different series of stocks, where increases and additions are subsequently made after the so-called "innocent stockholders" have purchased shares of the issue whose amount is not open to the criticism of being excessive and fictitious, but these instances are so exceptional that their correction can be looked after by the ordinary courts of justice where remedies against fraud are administered. Certainly the remedy is not by taxing the public to make the scheme profitable. To do so would be to put a premium upon the dishonest manipulation of the finances of the carrier and impose a handicap on the honestly conducted corporation. The larger income would go to the least deserving. Nearly all the corporation laws that I know anything about provide that the stockholders shall be consulted and shall authorize, by a vote of three-fourths or two-thirds, the proposed increase. If any stockholder objects to the issuance of fictitious stock, and the same be issued notwithstanding, he would have his remedy in court. If he let the opportunity pass, then he would have to take his chances along with the others, and his stock would be no better than that of the holders of the more recent issue.

But I say without qualification that, so far as the public is concerned, no matter how innocent he may be in fact of any guilty participation in issuing the fictitious stock, he has no moral or legal right to call upon the public to pay him dividends on his stock simply because he happens to be associated with enterprises that have put upon the market fictitious or watered stock. That is a matter of adjustment between him and the corporation. The public ought to be required to pay and the carrier ought to be authorized to receive only a fair return upon the value of the property that it is using for the time being in the public service. If that sum does not enable the carrier to pay interest on its bonds and dividends on its stock, it is not a matter that concerns the public. They can not call on the shippers and producers of the country to furnish money to make profitable every fraudulent investment in which they may be interested. They have no right to ask that the power of Congress be exerted to insist that the irregularity of their business methods—not to characterize it more strongly—shall be made good. What the public is entitled to is the use of the railroads, and what the railroads are entitled to from the public is a fair and reasonable rate for doing the service. That reasonable rate is a mere matter of adjustment between shippers and the carriers as the law is now, or between the Commission and the court and the carrier as we now propose.

Mr. ALDRICH. Mr. President——

The VICE-PRESIDENT. Does the Senator from Arkansas yield to the Senator from Rhode Island?

Mr. CLARKE of Arkansas. Certainly.

Mr. ALDRICH. If the Senator from Arkansas is right in his contention, it would be a very simple matter to arrive at a proper basis as to the rates of charge of the railroads of the United States.

Mr. CLARKE of Arkansas. Yes; I think so.

Mr. ALDRICH. If the railroads of the United States cost $25,000 a mile, and no more than that——

Mr. CLARKE of Arkansas. Taken as a whole.

Mr. ALDRICH. And they would be entitled to 6 per cent, which would be $1,500 a mile, it would be easy for the Commission, or somebody else charged with this matter, to ascer-

tain what rate would be required to pay that amount. It is true you would wipe out $8,000,000,000 of securities in the United States in the hands of innocent holders—although the Senator from Arkansas will not agree with me that they are innocent holders—but the Senator would see that justice would be done in that case in Arkansas, if not anywhere else. I think the plan of the Senator from Arkansas is a very simple one, and we do not need to adopt the amendment of the Senator from Wisconsin to ascertain the valuation of the railroads; but we can assume that $25,000 a mile is a proper valuation for the railroads of the United States, and that 6 per cent is a reasonable sum to be paid on that $25,000 a mile, which makes it a very simple proposition. Then, if you should reduce your rate to a rate per ton per mile and take the gross tonnage of those railroads, you could find out what the Pennsylvania road ought to charge, and what every other railroad ought to charge. It would be very easy and simple, according to the Senator's mathematical basis, to fix this whole matter.

ASSUME NOTHING, BUT FIX VALUE IN EACH CASE.

Mr. CLARKE of Arkansas. The Senator from Arkansas is not going to assume anything. I am going to take each railroad company and find out accurately, not by statistics nor by broad generalization that includes the whole 200,000 miles of railroad, but I am going to take each railroad and determine how much it is actually worth, how much its tonnage ought to be taxed to make a 6 per cent return on its actual value. I am not going to take $25,000 a mile as an arbitrary amount, for the reason that that is more than some are worth and it is vastly less than others are worth. I am satisfied in my own mind, from the little investigation I have made, that $25,000 a mile the country over would be an amount of money for which the whole railroad mileage could be reproduced.

Mr. BEVERIDGE. Mr. President——

The VICE-PRESIDENT. Does the Senator from Arkansas yield to the Senator from Indiana?

Mr. CLARKE of Arkansas. Certainly.

Mr. BEVERIDGE. I do not wish to pursue the Senator with this inquiry——

Mr. CLARKE of Arkansas. I am very glad to hear the Senator. It is an important matter, and one that is involved in this inquiry, and it ought to be talked about.

Mr. BEVERIDGE. I think that, as the Senator from Wisconsin stated the other day, it is by far the greatest problem in this whole great problem, and I want to see if I can not put my question in still more concrete form. The Senator says that he would give to certain investors, representing the actual value of the road, 6 per cent upon their investment, and to other investors, representing watered stock, or representing overvaluation, nothing. How would he determine which stockholders were to get 6 per cent and which were to get nothing?

Mr. CLARKE of Arkansas. I would pay 6 per cent into the treasury of the railroad company and allow them to distribute it in any lawful way. If they had bonds enough out to require the whole income to pay interest on these, I would first pay to the bondholders the interest.

Mr. ALDRICH. Would the Senator leave that to the Commission?

Mr. CLARKE of Arkansas. The Commission has nothing to do with the distribution. The Commission simply fixes the rate.

Mr. ALDRICH. I thought, with the Senator's idea of the Commission, especially a political commission, that he would probably be willing to leave it to them.

Mr. CLARKE of Arkansas. No; I would not be willing to leave anything to them, except the adjustment of the rate and having it reviewed to prevent the invasion of any constitutional right, and then I should make the railroads do the business they contracted to do when they accepted the franchise they exercise. The income of the railroad company will presumably be disbursed to those lawfully entitled to receive it. If it is not voluntarily disbursed to them, the courts are open to enforce the rights of those unjustly deprived of their rights to the fund collected from the public.

Mr. BEVERIDGE. Mr. President——

The VICE-PRESIDENT. Does the Senator from Arkansas yield to the Senator from Indiana?

Mr. CLARKE of Arkansas. Very cheerfully.

Mr. BEVERIDGE. I am very much obliged for the Senator's patience. I think the Senator will agree with me that his last answer was hardly an answer to the question. His answer was that in case there were bonds enough out which would absorb the entire 6 per cent or any other earnings of the railroad, they would be paid first. That is not an answer to the question that if, after the bonds were paid and the fixed charges were paid, or if there were no bonds still there was stock held by holders which represented the actual value of the road, and stock held by others which represented the excess value, how would the Senator determine which stockholders should have the excess after the bond interest was paid and which stockholders should have nothing? Suppose there are no bonds of the road, as an illustration, and the whole income, after the payment of charges, was to go in the form of dividends, the Senator says that certain stock should receive 6 per cent and certain other stock nothing. I am asking this question, as I asked it before and as I intend to ask it again of other Senators, How would that be determined? How would the Senator pick out certain stockholders and certain stock to receive the 6 per cent which he says they ought to have, and exclude other stockholders and other stock?

WHAT TO DO WITH WATERED STOCK NOT A MATTER THAT SHOULD CONCERN PUBLIC.

Mr. CLARKE of Arkansas. That is not a public question, nor is it one that any law we can enact will answer; therefore I can not give an answer to it as a Senator, but I could answer it if I belonged to one or the other named classes of stockholders. If I were a holder of stock that had represented the actual value, and fraudulent or watered stock had been put upon the enterprise in opposition to my consent, I would object to it, and in some proper form of action ask that the dividends should be declared and paid upon the valid stock certificates. If, upon the other hand, I was among those who held certificates representing the fictitious stock, I should, of course, be in favor of an equality of division of what was left after the bonds and fixed charges had been taken care of.

Mr. BEVERIDGE. How would you determine which was fictitious and which was not?

Mr. CLARKE of Arkansas. That is a matter that does not enter into the situation we are dealing with. It is not a public feature at all.

Mr. BEVERIDGE. Yes, Mr. President, I think, as has been said by many Senators here, it does. It is upon this overcapitalization, to which too severe epithets can not be applied, that these excess charges, which constitute in reality a tax upon the public, are based. That is what you are trying to cure by this and other legislation. What I am asking the Senator—as I asked the Senator from Wisconsin the other day and hope to have it answered before this debate is closed—is, How are you to determine what portion of the stockholders are to be paid and what portion are to be excluded?

Mr. CLARKE of Arkansas. With the utmost deference to my friend from Indiana, I will say that this is not a public question. It is not a question with which Congress has any possible concern. It is a question that arises between different classes of stockholders. What we are authorized to do is to authorize quasi public corporations to levy a tax upon the public sufficient to pay a proper return upon the value of the property that they use for the public good; but as to how they are to distribute that fund is a matter for them to determine. If it produces insolvency, then the railroad company must be reorganized; the railroad will not be torn up, and the country will not be deprived of it, but somebody will take it who is willing to run it for a fair return upon its value. If they have got its ownership scattered among stockholders of different character, so that they can not tell the good from the bad, the public is not interested in that, nor is it to be taxed any more on that account than it would if it were honestly conducted. In other words, it does not inhere in our duty to adjust controversies of that sort between parties. We leave them to be settled by the common sense and the ingenuity of the lawbreaker, without calling at all on the ingenuity of the Congressional lawmaker to furnish any additional remedies.

Mr. ALDRICH. Mr. President——

The VICE-PRESIDENT. Does the Senator from Arkansas yield to the Senator from Rhode Island?

Mr. CLARKE of Arkansas. Very cheerfully.

Mr. ALDRICH. Can the Senator tell me what the average passenger rate is in the State of Arkansas on Arkansas roads?

Mr. CLARKE of Arkansas. About 3 cents a mile. That is the minimum.

Mr. ALDRICH. What is the average freight rate per ton per mile?

Mr. CLARKE of Arkansas. All the traffic will bear.

Mr. ALDRICH. Can the Senator tell me about what it will bear?

Mr. CLARKE of Arkansas. It is pretty high, but I have not the figures at hand.

Mr. ALDRICH. In other words, the truth is, I suppose, the rates in Arkansas are about twice what they are in other parts of the United States. I do not know whether it is the fault of the State of Arkansas or the fault of the railroads of Arkansas, yet I should think it would be a desirable proposition if the

Senator could spend a little time investigating that question, because his people are interested in it.

Mr. CLARKE of Arkansas. I want to put the railroads of Arkansas on the footing of "the most favored nation." I have no special complaint about the railroads of Arkansas that does not extend to every other railroad all over our country. I do not know any better roads in point of physical equipment. They are run, of course, by human beings.

Mr. BEVERIDGE. Mr. President, I hope the Senator will pardon me for another interjection, rather than a question, in response to the Senator's statement that this is not a public question. On the contrary, does not the Senator think the excuse for making these great charges that they are made in order to pay proper dividends upon overcapitalization, is really the greatest public question and the root public question of the whole thing? That is the reason why these so-called "excess charges" are made.

Mr. CLARKE of Arkansas. We differ about the character of the question, not its importance. I think it is a private question instead of a public one. I think what we are called upon to do here is to see that the public is not taxed for the use of this public facility, this public utilty, any more than the service is worth, and the worth of the service is a fair return upon the actual value of the property employed for the public purpose and at the time it is so employed.

I did not originate that idea. There is nothing peculiar about it. There is nothing about it that I claim. I got it out of recorded utterances of the Supreme Court of the United States.

NO DIFFERENCE IN LAW BETWEEN BROAD AND NARROW COURT REVIEW.

When interrupted I was just entering on that part of my remarks in which I hope to be able to show that the single purposes for which the courts will take cognizance of the action of the Interstate Commerce Commission in the matter of making rates is to determine whether or not the carrier's constitutional right to just compensation had been respected. The Supreme Court of the United States is the final arbiter in all disputes concerning the validity of Congressional legislation or that of the States. When that court decisively fixes the boundaries of legislative power and discretion it will accomplish no good purpose to insist that something in conflict therewith may be done, no matter how wholesome, as a matter of theory, it might prove to be if done. The doctrine of that court, as I think I will be able to show as I proceed, is that it will not hesitate to nullify the action of a legislative commission in fixing rates when it appears that the constitutional right of the carrier to just compensation would be invaded if it is compelled to charge and receive the rates as fixed. But the court has with equal emphasis decided that in determining this question it will not consider a single rate, but will take under review the entire body or schedule of rates which the railroad company is charging and collecting from its patrons. It is further established, as I think I may say without fear of successful contradiction, that the character of the service performed by the Commission in fixing rates is legislative and as such does not fall within the revisory powers of the court except for the single purpose of determining its harmony with the paramount restraints and guaranties of the Constitution. I read now from the opinion of the court in the case of San Diego Land Company *v.* National City (134 U. S., 754):

> But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public—that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use.
>
> * * * * * * *
>
> Each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, as an entirety—
>
> Not a single rate, but as an entirety—
>
> so unjust as to destroy the value of its property for all the purposes for which is was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law.
>
> * * * * * * *
>
> What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable *value of the property at the time it is being used for the public.* The property may have cost more than it ought to have cost—
>
> And it may have outstanding more bonds and stocks than it ought to have—
>
> and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property. So that it can not be said that the amount of such bonds should in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just both to the company and to the public.

The test is the value of the property used on behalf of the public and at the time so employed, not how many bonds or shares of stock have been issued by the corporation owner.

Continuing, the court says:

> It is sufficient to say, upon a careful scrutiny of the testimony, our conclusion is that no case is made that will authorize a decree declaring that the rates fixed by defendant's ordinance, looking at them in their entirety—and we can not look at them in any other light—are such as to be a taking of property without just compensation.

Mr. ALDRICH. Will the Senator allow me to ask him a question?

Mr. CLARKE of Arkansas. Certainly.

Mr. ALDRICH. I infer from the Senator's remarks that he does not think that the courts can ascertain whether the constitutional rights of the carrier have been invaded without an investigation into the whole subject as to all the rates.

Mr. CLARKE of Arkansas. Yes, sir; that is my opinion.

Mr. ALDRICH. And as to the stocks and bonds and capital, etc. In other words, there can be no such thing as a narrow review.

Mr. CLARKE of Arkansas. No; there can not be a narrow and there can not be a broad review. The courts can review for one purpose, that of determining whether the income of the railroad allowed by the Commission is sufficient to satisfy the constitutional demand of just compensation. That is what it means; that is all it means; you can not limit it and you can not make it any broader.

I repeat, so far as I am concerned, I would just as soon that the Senator from Rhode Island would write the review amendment as to write it myself, because they would both mean the same thing in law. You can put it into the bill that the court shall not review it, but it will review it, as it did in the Minnesota case, in 134 United States. The supreme court of Minnesota had construed the statute of that State to mean that the action of the Commission was final; the United State Supreme Court reversed this ruling, holding that the carrier could not be denied the right to show that the rate was confiscatory.

Mr. BACON. Mr. President, will the Senator allow me to ask him a question?

The VICE-PRESIDENT. Does the Senator from Arkansas yield to the Senator from Georgia?

Mr. CLARKE of Arkansas. Certainly.

IS RIGHT TO PREVENT DISCRIMINATION A JUDICIAL QUESTION?

Mr. BACON. The Senator has been giving very careful study to this particular branch, and I confess there are some features of the question which are troublesome to me. The question of review as to the particular matter of compensation is one thing. I want to know what is the Senator's view? I am asking this, not for the purpose of antagonizing whatever view he may express, but for the purpose of eliciting an expression from him. What is the Senator's view as to the power of Congress to confer upon the courts the right to call in question and review the orders of the Commission, not as to rates, but as to regulations and practices?

Mr. CLARKE of Arkansas. I can answer that question by saying that anything of a legislative character done by the Commission can not be reviewed by a judicial tribunal. If you can frame a system of regulations by which a judicial question may be made to appear, the court will take charge of that and dispose of it in a proper case.

Mr. BACON. Of course I recognize that as a general proposition. It covers the question of compensation and every other question as to what is done by the Commission under the delegation of authority from Congress; but it was for the purpose of finding out what was the Senator's view as to whether or not this fell within the particular class of questions which the courts could be given authority by Congress to review.

The Senator will pardon me a moment. I want to draw, if I can, a distinction between the class of questions where the authority of the court would obtain, under the suggestion of the Senator from Arkansas, regardless of what Congress might do on the question of compensation. Recognizing that now as correct, when it comes to the question of compensation, the power conferred or withheld by Congress, according to the view of the Senator, will not amount to anything, the courts having a certain jurisdiction which they will certainly, in the absence of any distinct denial of it, and even in some cases with the denial of it, exercise. The point I want the Senator's

expression upon—and I repeat I do it for the purpose of getting his view, as he seems to have given very careful study to this particular branch, as well as other branches of the subject—is as to the power of Congress to confer upon the courts the duty and the authority to review the orders of the Commission which do not relate to compensation, but which relate to regulation and practice, because there, it seems to me, is the doubtful domain.

Mr. SPOONER. Suppose it involves compensation?

Mr. BACON. I want to leave that out. The Senator from Wisconsin suggests, soto voce, "Suppose it involves compensation?" I want to leave that out of the present question, because I want to draw the distinction clearly, if possible, between the authority given to the court to review so much of the orders as involve the constitutional question of compensation and other orders which do not involve that, but which do involve questions of regulation and practice.

Mr. ALDRICH rose.

Mr. BACON. I hope the Senator from Rhode Island will pardon me just a moment until I finish my statement.

I started to give an illustration, but I do not know that I am sufficiently familiar with railroad matters to give it clearly, but I would rather enlarge what I have said. The same question might be suggested as to the orders of the Commission, which should be deemed to be preferential, which should be deemed to give a preference—and I use the word "preferential" not in its technical sense there—which should be deemed to give a preference to one community over another community upon the same line. That is not a question of compensation, but it may be a most vital question in the practical administration of this law as to whether or not the orders of the Commission in all these matters of regulation and practice shall be final with them, or whether the courts shall be distinctly vested by Congress with the power to pass them under review. I think it extremely important that the court should have the power to pass upon the question whether or not the Commission has given preference to one community over another. It may be at some time of most vital importance to the business of a community; it may involve its business life or death, and for that reason I am particularly anxious to hear the learned and distinguished Senator upon that particular phase from a legal standpoint, under the authorities, as to what is the power of Congress to devolve upon a court the authority to review orders which do not relate to matters of compensation, but which do relate to the vital matters of regulation and practice.

Mr. CLARKE of Arkansas. It is hard——

Mr. ALDRICH. When I sought to interrupt the Senator——

Mr. BACON. I beg the Senator's pardon; I ought to have yielded to him earlier.

The VICE-PRESIDENT. Does the Senator from Arkansas yield to the Senator from Rhode Island?

Mr. BACON. I hope the Senator from Rhode Island will let the Senator from Arkansas respond to my inquiry, because I am anxious to get a concrete answer, if possible.

Mr. ALDRICH. I will wait until the Senator from Arkansas answers that question, and then I will call the attention of the Senator from Georgia to some provisions of the pending bill.

Mr. CLARKE of Arkansas. I could not answer wholesale that question. Before I can answer intelligently I must have my attention directed to the particular practice called in question.

Mr. BACON. I will call the attention of the Senator to one, if he will pardon me. Suppose upon the same line of road—and I say the same line, I mean the connecting road—an order of the Commission is deemed to give a preference to one community over another, thinking it has equal rights in the matter of interstate commerce affected by that particular order. Does the Senator think, outside of the provisions of this bill—I am not speaking about that, I am speaking about constitutional power, because that is what the Senator is so earnestly and learnedly discussing—under the constitutional power it is within the province of Congress to give to the courts the power to review and set aside as unjust an order of the Commission which gives a preference to one community over another community?

Mr. CLARKE of Arkansas. Certain elements of discretion and policy enter into this whole business of rate making. There are different theories on which it may be done. There is the mileage basis, for instance; or, on the other hand, the Commission might take into consideration the question of the economic distribution of products, so that one rate would be relatively higher than another. Those are matters of policy and wisdom to be weighed and concluded by the Commission. In the exercise of that power the Commission may abuse it, and so obviously so as to be guilty of fraud, when it can be attacked by any shipper or community, where the instance of discrimination is so pronounced that honest men would not differ in saying that the Commission had not been actuated by proper motives in doing what it did. There is a measure of discretion in matters of that kind. That would probably be referred to the Commission. To what extent the courts would undertake to control them I am not prepared to say. I would have to know all the facts of the particular case.

Much that is said in Interstate Commerce Commission *v.* Baltimore and Ohio Railroad Company (145 U. S., 263) would indicate that the courts will interfere to prevent undue preferences as between individuals and localities. But in Interstate Commerce Commission *v.* Detroit (167 U. S., 646) the court says much must be left to the discretion of the Commission, but how much the courts will tolerate before interfering to enforce some constitutional right said to be violated is the question.

Mr. BACON. If the Senator will pardon me, and I do not unduly interrupt him, I am not limiting the question to what the courts would undertake to do as a matter of inherent jurisdiction, if I may so term it, but I am speaking with practical reference to what we do in the framing of this bill.

Mr. CLARKE of Arkansas. I think we can direct the Commission to make all the rates upon a mileage basis. When we do it we will hear from somebody.

Mr. BACON. I think so, too, and for one I would not——

Mr. FORAKER. Mr. President——

Mr. BACON. I hope the Senator from Ohio will pardon me for a moment, and let me finish the question. That is true. I think the Senator from Arkansas is correct, that we would hear from a number of people on that subject. But I wanted to know, with a view to guiding my own actions, whether, in the opinion of the Senator, we would be within constitutional bounds if we inserted in this bill what I think ought to be inserted in it—if we have the constitutional authority to do it—that if the Commission issues an order which gives a preference to one community over another community claiming the right to equal privileges——

Mr. SPOONER. An undue preference.

Mr. BACON. That is a question of degree; whether we can insert in this bill, and constitutionally insert in it, a provision giving to the courts the authority to review the order of the Commission giving a preference to one community over another community in the rate which it established.

Mr. FORAKER. Mr. President——

The VICE-PRESIDENT. Does the Senator from Arkansas yield to the Senator from Ohio?

Mr. CLARKE of Arkansas. Certainly.

Mr. FORAKER. If the Senator from Arkansas does not object, I will call the attention of the Senator from Georgia to the fact that the Supreme Court of the United States has already decided that under existing law a discrimination against a community made by the railroads in the fixing of their rates may be enjoined at the suit of the Interstate Commerce Commission, predicated upon a complaint made to it of such discrimination. The case is reported in 189 United States, page 274, and is known as the case of the Interstate Commerce Commission *v.* The Missouri Pacific Railroad, otherwise known as the Wichita case. It was a suit commenced before the passage of the Elkins law, and the jurisdiction of the court was contested, but when it went to the Supreme Court the Elkins law had been in the meanwhile passed, and the Supreme Court said, without regard to what the law prior to that time provided, under the Elkins law such a suit can be maintained.

If so, I do not see why we should be complicating the situation by seeking a remedy of that kind through some other sort of legislation. It is just as clear as anything can be, and it is upon that section of the Elkins laws—and that is the reason why I have broken in with this interruption, which I very much dislike to do—it is upon that section of the Elkins law that I think our attention ought to be turned. I have sought by the amendment I have offered to broaden and strengthen that provision, so as to have all suits of that character brought at the expense of the Government instead of at the expense of the individual litigant.

Mr. ALDRICH. That is one of the things——

Mr. BACON. I hope the Senator from Rhode Island will let the Senator from Arkansas give me a response to my question; but before he does so I want to say a word. I recognize that he has clearly indicated the correct line of cleavage between acts which are legislative and which can not be reviewed and acts which are not legislative; and I wanted to find out, as the result of the Senator's investigation, into which class he considers that this particular question falls; whether the action of the Commission in fixing a rate which is alleged to give a preference to one community over another community is

such a legislative act, or, rather, such a performance of a delegated legislative intent on the part of the Legislature as would exclude it from the class of questions which can be considered by the court, or whether it is, on the other hand, of the other class, where the court might voluntarily take jurisdiction, or where we could with propriety expressly and explicitly require it to be done in this bill.

Mr. CLARKE of Arkansas. The question as to whether any community or any shipper can complain of a discrimination of rates that are fixed by the Commission is not here. I have no hesitancy in saying that the Commission has a certain latitude of discretion and policy that is available to them in making up their orders and fixing rates which may upon their face appear to be discriminatory between communities. The extent of that would determine its legality. The court might say it was a fraudulent exercise of power, which presents an inquiry always the subject of judicial inquiry.

The case cited by the Senator from Ohio hardly answers the question of the Senator from Georgia, for the reason that there the Interstate Commerce Commission brought the action, whereas he is inquiring as to whether we can authorize the shipper or the community to bring an action against the Commission to correct its work.

Mr. FORAKER. I apprehend that if we can authorize the Commission to bring a suit on behalf of the shipper, we could authorize the shipper himself to bring it.

Mr. CLARKE of Arkansas. Against the Commission?

Mr. FORAKER. Against the railroad.

Mr. BACON. But that is not the question.

Mr. CLARKE of Arkansas. Against the Commission.

Mr. FORAKER. Oh! To bring it against the Commission?

Mr. BACON. I asked the question because I think it is perfectly proper for us in the enactment of this legislation to anticipate not simply the possibility, but the probability, that the time may come when the Commission will fall under the influence of the railroads.

Mr. CLARKE of Arkansas. And will Congress also fall under the influence of the railroads?

Mr. BACON. It is so charged by some, but I think unjustly.

Mr. CLARKE of Arkansas. I deem it to be rather an excessive fear to assume the existence of a condition when improper influences will not only control the action of the Commission, but the corrective power of Congress as well. The courts might not preserve their independence in such surroundings.

Mr. BACON. The Senator will recognize the fact that when it comes to an administrative officer, the ease with which such influence can be exerted is very much greater. It is different from where Senators and Representatives are chosen from the length and breadth of this land.

Mr. FORAKER. I had just come into the Chamber, and I may be under a misapprehension as to what preceded. But what difficulty is there about authorizing any person who may be aggrieved to bring a suit to test the validity of an order that has been made by the Commission? The law as it now stand authorizes anyone who is aggrieved by an order that is made to put it to the test in the court.

Mr. ALDRICH. Mr. President——

The VICE-PRESIDENT. Does the Senator from Arkansas yield to the Senator from Rhode Island?

Mr. CLARKE of Arkansas. Yes, sir.

Mr. ALDRICH. I have been trying to get the attention of the Senator from Georgia to a statement which I desire to make, which is along the lines of that made by the Senator from Ohio.

The Senator from Georgia was asking this question, as I understood him—whether Congress could give to the courts power to review the decisions of the Interstate Commerce Commission affecting regulations and practices where no question of rates is involved.

Mr. BACON. Yes.

Mr. ALDRICH. And he cited questions of discrimination.

Mr. BACON. Yes.

Mr. ALDRICH. Now, what I was about to say was that we did that precise thing in the Elkins law. We gave to the courts power to review questions of discrimination where it had been once heard by the Commission, and the Supreme Court of the United States, as the Senator from Ohio has said, in the Wichita case upheld the validity of that act. I think that answers the Senator from Georgia. It seems to me it does clearly.

Mr. BACON. Where does the Senator draw the line? Does the Senator mean to say that, according to his view, we could give to the Commission—I am not speaking of the propriety of it, but of the power—certain powers, and, as to the exercise of each and every one of those powers, we could give to the courts the right to review?

Mr. ALDRICH. I did not make the statement as broad as that. The Senator's question was not as broad as that.

Mr. BACON. Is that the Senator's view?

Mr. ALDRICH. That is hardly a question which anybody ought to be required to answer. The Senator was putting a concrete case, and I was saying with respect to it that exactly what the Senator asked whether Congress had the power to do Congress had done, and the court upheld that action.

Mr. CLARKE of Arkansas. I will answer that question generally, and pass on. Courts have jurisdiction to hear any judicial question, and it is a difficult matter to keep them from doing it in a proper case. They have no jurisdiction to hear and determine anything which pertains to legislative policy or legislative discretion, and you can not confer upon them authority to do so. A question may partake of the nature of both. I think a legislative duty may be performed in a way to conflict with some constitutional right, and when that is the case the courts will take possession of the controversy for the purpose of settling it, just as they have taken possession of the rate-making question for the purpose of determining whether the completed action of the commission leaves to the carrier just compensation for the service it renders. I say there is a discretion there. It must not be granted simply because it is asked for. The court says the rule is that before it will interfere with rates fixed by legislative authority that the case must show such a palpable invasion of the right of the carrier that honest men will not differ about the result.

Now, I was insisting that the one function that the court would discharge in connection with this rate-making business—and I was on the rate-making branch of it at the time—was to determine the only judicial question in the controversy viewed from that standpoint, and that was whether or not the body of rates afforded to carriers just compensation for the use of its property.

COURTS DO NOT SIT AS APPELLATE BOARD OF REVIEW.

I read now from the case of the San Diego Land Company *v.* Jasper (189 U. S.), the opinion being delivered by Mr. Justice Holmes:

> The main object of attack is the valuation of the plant. It no longer is open to dispute that under the Constitution "what the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public.

Again:

> We will say a word about the opposite contention of the appellant, that there should have been allowance for depreciation over and above the allowance for repairs. From a constitutional point of view we see no sufficient evidence that the allowance for 6 per cent on the value set by the supervisors, in addition to what was allowed for repairs, is confiscatory. On the other hand, if the claim is made under the statute, although that would be no ground for bringing the case to this court, it has been decided by the supreme court of California that the statute warrants no such claim. (Redlands, Lugonia and Crafton Domestic Water Co. *v.* Redlands, 121, California, 312, 313.) We go no further into detail. *We do not sit as a general appellate board of revision for all rates and taxes in the United States. We stop with considering whether it clearly appears that the Constitution of the United States has been infringed, together with such collateral questions as may be incidental to our jurisdiction over that* ONE.

The court will look into it with a view of determining whether or not a constitutional right has been invaded. The Constitution is above the statute. The obligation to bring about conformity between laws and alleged laws, striking down those that are invalid and maintaining those that are valid, is the supreme function of the court. It is the only question connected with the legislative function of prescribing rates that has ever been brought before the court and decided.

In Minneapolis and St. Louis Railroad Company *v.* Minnesota (186 U. S.), the court, in the course of its opinion, says:

> While we never have decided that the Commission may compel such reductions, we do not think it beyond the power of the State commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that the burden is upon them to impeach the action of the Commission in this particular.

In that case the carrier was compelled to haul coal from Duluth to St. Paul and places south of there for a less rate than it thought it ought to have. It made a difference of about $1,500 in the income of a railroad whose gross income was $700,000. The court said the matter was too trifling to affect the general question of just compensation. It could not determine the matter on the basis of that single rate. What it looked at was the entire body of rates; and if those rates, looked at as an entirety, produce a sufficient income to satisfy the constitutional guaranty of just compensation, they would allow the other matter to be disposed of in some administrative way.

Summing up in the case of the Interstate Commerce Commission *v.* Railway Company (167 U. S., p. 469), Judge Brewer, in his opinion, said:

> It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely

different thing to prescribe rates which shall be charged in the future—that is a legislative act.

We have therefore these considerations presented:

First. The power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function, and having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attaching to such carriage, is a power of supreme delicacy and importance.

And again, on page 511, as follows:

Our conclusion, then, is that Congress has not conferred upon the Commission the legislative power of prescribing rates, either maximum or minimum or absolute.

In the case of the Chicago Railroad *v.* Wellman (143 U. S.) the judge who wrote the opinion said:

The legislature has the power to fix rates, and the extent of judicial interference is protection against unreasonable rates.

Judge Brewer, in the case of Reagan *v.* Farmers' Loan & Trust Company (154 U. S.), said:

It is doubtless true as a general proposition that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. * * * The courts are not authorized to revise or change a body of rates imposed by the legislature or a commission; they do not determine whether one rate is preferable to another, or what under all the circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust or unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation. * * *

The challenge in this case is of the tariff as a whole, and not of any particular rate upon any single class of goods. As we have seen, it is not the function of the courts to establish a schedule of rates. It is not, therefore, within our power to prepare a new schedule or rearrange this. Our inquiry is limited to the effect of the tariff as a whole, including therein the rates prescribed for all the several classes of goods, and the decree must either condemn or sustain this act of quasi legislation.

If a law be adjudged invalid, the court may not, in the decree, attempt to enact a law upon the same subject which shall be obnoxious to no legal objections. It stops with simply passing its judgment on the validity of the act before it. The same rule obtains in a case like this.

If that is the only judicial feature in the business of making rates; if that is the only judicial aspect in which it can be considered; it is perfectly obvious that the court can not undertake to substitute its judgment as to a matter of policy or discretion for that of the Commission. They can review the entire action of the Commission with one object in view, and that is, to determine whether or not the carrier has been protected in his constitutional right to just compensation. That being the case, it is unnecessary in a body composed so largely as this is of lawyers to cite authorities in support of the proposition that courts will refuse, if called upon, to exercise a revisory power over legislation with a view of correction if they should differ in opinion as to a matter of policy with the legislature.

In Gordon *v.* The United States (117 U. S.), the opinion having been prepared by Chief Justice Taney, and which has been referred to with strong approval by the Senator from Wisconsin [Mr. SPOONER], the court sustains the proposition. I am content that the court will decline, when called on by Congress, to pass on any question not of a strictly judicial character. I will read just enough of the opinion to show what that court thought of the principle at that time:

This power over legislative acts is not possessed by the English courts. They can not declare an act of Parliament void, because, in the opinion of the court, it is inconsistent with the principles of Magna Charta or the Petition of Rights. They are bound to obey it and carry it into execution. Yet, in that country, the independence of the judiciary is invariably respected and upheld by the King and the Parliament, as well as by the courts; and the courts are never required to pass judgment in a suit where they can not carry it into execution, and where it is inoperative and of no value, unless sanctioned by a future act of Parliament. The judicial power is carefully and effectually separated from the executive and legislative departments. The language of Blackstone upon this subject is plain and unequivocal.

Quoting Blackstone, who says:

In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed but not removable at pleasure by the Crown, consists one main preservative of public liberty, which can not subsist long in any state unless the administration of common justice be in some degree separated from the legislative and executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law, which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, the union might soon be an overbalance for the legislative. For which reason, by statute (Car. I, chap. 10), which abolished the court of star chamber, effectual care is taken to remove all judicial power out of the hands of the King's privy council, which it was then evident, from recent instances, might soon be inclined to pronounce that for a law which was most agreeable to the Prince or his officers.

Judge Taney proceeds:

These cardinal principles of free government have not only been long established in England, but also in the United States from the time of their earliest colonization, and guided the American people in framing and adopting the present Constitution. And it is the duty of this court to maintain it unimpaired as far as it may have the power. And while it executes firmly all the judicial powers intrusted to it, the court will carefully abstain from exercising any power that is not strictly judicial in its character and which is not clearly confided to it by the Constitution. (117 U. S., 707.)

Mr. FULTON. I understand the Senator's position to be that the only question that can become judicial in this matter of rate making is whether or not a prescribed rate amounts to confiscation or is an invasion of the constitutional rights of the carrier to have a just compensation. Now, I ask the Senator if the courts have not, when the question was whether a rate prescribed by the carrier is or is not a reasonable rate, taken jurisdiction of such cases, and whether they have not enjoined the carrier from charging a rate which they held to be unreasonably high; and if they have done that, does not that amount to prescribing a maximum rate for the future?

Mr. CLARKE of Arkansas. In the first place, I am not familiar with any case where the courts have enjoined a railroad from charging too much. I am familiar with a line of cases where carriers have been sued to recover back after payment of the excess beyond what is reasonable.

Mr. FULTON. I call the Senator's attention to a case where the Commission has condemned a rate established by the railroad as being unreasonably high. Under the law as it stands at the present time the Commission is authorized to institute a suit against the railroad company to enjoin the exaction of such rates in the future. Now, such cases have been twice, if I remember correctly, before to the Supreme Court, and have gone off on another question. But the circuit courts have enjoined such rates as being unreasonably high—extortionate. I ask the Senator——

Mr. CLARKE of Arkansas. Enjoined the Commission's rates?

Mr. FULTON. No; enjoined the rates of the railroad at the suit of the Commission—enjoined them as extortionate.

Mr. CLARKE of Arkansas. That is in line with my argument.

Mr. FULTON. It is not in line with the Senator's contention that the only time that the question as to a rate becomes judicial is when it is confiscatory. It is just exactly the opposite.

Mr. CLARKE of Arkansas. It is a question in the instance named by the Senator of complying with the order of the Commission. It is a question of complying with the legislation and not antagonizing it.

Mr. FULTON. The court goes into the inquiry whether the rate is unreasonably high.

Mr. CLARKE of Arkansas. It goes into the inquiry for the purpose of determining whether, as the Commission has said, it is unreasonably high, and if found to be so, for the purpose of enforcing the order of the Commission.

Mr. FULTON. I ask the Senator this: Whenever it is taken before a court to determine whether a rate is reasonable or not, does it not then become a judicial question which the court must determine? When issue is joined on that, whether it be between the Commission and a railroad company or a private shipper and a railroad company—when issue is joined, whether a charge made by the railroad is reasonable, is not the question a judicial one?

Mr. CLARKE of Arkansas. No; it is a legislative one in many of its aspects. Judge Brewer, in opinions, says whether a completed rate that has been charged is reasonable or not for the services rendered is a judicial question. The question as to what will be reasonable rates for the future is a legislative question. As the Commission makes its rates entirely for the future, its action is not judicial. Then, of course, the circumstance as to whether the challenged rate was one made by the railroad company, as in the absence of action by the sovereignty it may do, or was one that was prescribed by the legislature, either directly or through the agency of a commission, would determine its character as being of judicial or legislative cognizance. A railroad-made rate may be challenged for excessiveness in court, and the court may determine that it is excessive and give judgment for the recovery of the excess wrongfully demanded. But it is quite another thing for a carrier to go into court asking for a review of rates fixed by legislative authority. This character of rates are subject to assault in their entirety only on the ground that the body of rates will not yield revenue sufficient to afford the carrier just compensation for the use of its property. This is the only inquiry subject to court review, and even in this connection the court, although it may decide that the rate is too low, will not modify the legislative rate to the extent only that it finds it to be less

than the carrier is entitled to, but will nullify the entire rate fixed, leaving an excessive railroad-made rate in force.

Mr. FULTON. If that be true, and if it is always a legislative question unless there is an invasion of the constitutional rights of the carrier, how can the Commission under the present law condemn a rate charged by the railroads and recommend a lower rate, and the railroad company refusing to obey the recommendation of the Commission, maintain a suit to have the rate charged by the company enjoined as being too high if it is always a legislative question?

Mr. CLARKE of Arkansas. The present law says that a suit of that character may be brought, but in the event it is, the finding of the Commission is only prima facie unreasonable.

Mr. FULTON. Who determines whether or not the rate is unreasonably high?

Mr. CLARKE of Arkansas. The Commission has only indicated an opinion. They have no power to fix a rate. They do not make a decisive order. They do not assume to fix the rate. We are now attempting to give power to fix the rate.

Mr. FULTON. Before the court, finally, who determines whether or not the rate is unreasonably high?

Mr. CLARKE of Arkansas. The Commission sends it to the court with the simple statement that that is, in its opinion, prima facie excessive. The nature of the reference shows that the Commission has not fixed a rate, and has no power to do so.

Mr. FULTON. Suppose the court finally determines that the Commission was wrong; that the rate was not unreasonably high?

Mr. CLARKE of Arkansas. It is sent there for that specific purpose——

Mr. FULTON. Does not the court exercise——

Mr. CLARKE of Arkansas. With the statement that it is prima facie excessive, and then the court determines whether or not there has been a showing made which overcomes the prima facie showing.

Mr. FULTON. Does not the court exercise judicial power in determining that question——

Mr. CLARKE of Arkansas. In the first place, the Supreme Court——

Mr. FULTON. Or does it exercise legislative power?

Mr. CLARKE of Arkansas. It is exercising judicial power alone in whatever it does in that connection. The rate under investigation is one made by the railroad company, and such rates are subject to judicial action. In a Commission-made rate the immunity from judicial revision arises from the fact that the Commission's action is in effect that of the legislature. Judicial supervision of legislative action goes no further than to determine its conformity to the Constitution.

Mr. FULTON. It is a judicial question.

Mr. CLARKE of Arkansas. It is a judicial question in so far as it assails a rate made by the railroad company. The matter comes to the court for the purpose of showing the unreasonableness of the railroad-made rate. The Commission indicated an opinion which is to be deemed evidence and not a finding, and this is to receive a presumption of prima facie verity. The Supreme Court in 167 United States decided that the Commission did not have power to fix a rate. The cases mentioned by the Senator from Oregon do not appear to me as overruling all of these other cases, wherein it is said so specifically and emphatically that the only question that is judicial in dealing with a legislatively fixed rate is to determine whether or not the carrier was getting enough out of the rate allowed to satisfy the constitutional guaranty of just compensation.

Mr. FULTON. I would not contend that the cases I suggest overrule the case the Senator has read or that they are even inconsistent. But in the *Reagan* case, and the other case read by the Senator, the court was speaking simply of the case that was before it. It was not speaking of a case where issue might be joined as to whether the rate was too high, because manifestly issue may be joined in a case as to whether a rate is too high. Otherwise at common law a shipper could not go in and enjoin a rate if it was too high nor could the Commission go in and enjoin a rate if it was too high. If it was not a legislative question and not a constitutional question, manifestly it must be a judicial question when issue is joined whether it be contended that the rate is unreasonably high or unreasonably low.

Mr. CLARKE of Arkansas. I can not conceive of a case where the Commission will fix a rate and go into court and ask to have it enjoined on the ground that it is too high.

Mr. FULTON. The Senator misunderstands me. The Commission under the law as at present does not fix the rate, but it inquires on complaint whether or not a rate established by the railroad is unreasonably high. It condemns a rate, we will say, but nevertheless the railroad continues to charge the rate. The Commission then brings suit to enjoin that rate, and the court must determine whether or not the rate is unreasonably high in order to sustain the order of the Commission and grant the relief prayed for, and in determining that question I submit it determines a judicial question. The question does become judicial when issue is joined on that proposition.

COMMISSION HAS NOW NO POWER TO FIX RATES.

Mr. CLARKE of Arkansas. The defect in the position assumed by the Senator's question is that the Commission has fixed no rate. They have simply made a finding that in their opinion a given rate made by the railroad is too high, and that the proper rate ought to be so and so, provided no evidence is offered to the court in the controversy which shall overcome the prima facie force and effect of this finding. They do not fix any rate; they have no authority to do it; they are expressly forbidden by not having the power to do so conferred in express terms. In the absence of legislative action the rate fixed by the carrier is always subject to investigation from a judicial standpoint by those who have to pay it. But that is a different question from attacking a rate fixed by legislation.

To make more clear my answer to the inquiry of the Senator from Oregon [Mr. FULTON], as I understand him, I will emphasize by stating this: The action of the Interstate Commerce Commission in condemning the railroad-made rate is efficient to the extent only of precipitating or creating an inquiry which involves that rate. The Commission does not assume to make a rate, and therefore no part of the legislative power of the Government inheres in its action. It simply challenges a rate, and when the court comes to pass upon the reasonableness of it it is not called upon to exercise its judgment as to whether or not a legislative body has erred, but it deals with a rate made by the corporation itself. Railroad-made rates have always been subject to judicial investigation with reference to their reasonableness in all proper cases. To assume that simply because the Interstate Commerce Commission challenges a rate it thereby prescribes the rate it suggests would be, in effect, to give by indirection to the Commission the rate-making power. This has never been done, but we trust that it will not be long before this statement can not be made. The force of my answer to the Senator from Oregon may be made plainer by calling his attention to what the Supreme Court has said on the subject. The court, in Interstate Commerce Commission *v.* Railway Company (167 U. S., 511), said:

> Our conclusion, then, is that Congress has not conferred upon the Commission the legislative power of prescribing rates, either maximum or minimum or absolute. As it did not give the express power to the Commission, it did not intend to secure the same result indirectly by empowering that tribunal to determine what in reference to the past was reasonable and just, whether as maximum, minimum, or absolute, and then enable it to obtain from the courts a peremptory order that in the future the railroad companies should follow the rates thus determined to have been in the past reasonable and just.

Mr. FULTON. Mr. President——

The VICE-PRESIDENT. Does the Senator from Arkansas yield to the Senator from Oregon?

Mr. CLARKE of Arkansas. Certainly.

Mr. FULTON. I wish to say, before asking the question, that I realize the Senator has been on the floor a good while and he may be tired. So I will not annoy him.

Mr. CLARKE of Arkansas. I am not in the least fatigued. I will hear the Senator.

Mr. FULTON. I do not wish to detain him.

Mr. CLARKE of Arkansas. I will not be disturbed by the interruption of the Senator.

Mr. FULTON. The Senator was saying a while ago that the only question which could be determined on review would be the question as to whether or not the constitutional right of the carrier had been invaded—the question as to whether or not the rate prescribed by the Commission afforded just compensation—and hence I understood the Senator to say it made no difference in what language the review should be framed, whether a broad or a narrow review, that but one review could be had.

Mr. CLARKE of Arkansas. That is true as to revision of rates fixed by the Commission.

Mr. FULTON. I ask the Senator if that is not rather a mistaken conception of the situation, in view of the fact that there are many orders and regulations which the Commission would be authorized to prescribe which do not involve the question of just compensation at all. For instance, requiring a carrier to furnish cars to a shipper, there being no question as to what the charge should be, but simply that they should be required to furnish the cars. The question of just compensation would not come in there. It would be a mere matter of regulation or practice. Under a broad review might not such an order as that be taken up before the court? What I mean by broad review is unlimited review.

Mr. CLARKE of Arkansas. I intended to answer both the Senator from Georgia and the Senator from Rhode Island by saying that I was, at the time when I was interrupted, addressing myself particularly to the business of making rates. I had not at that time reached the stage of my argument where I had occasion to refer to the other matter. But I will say now, if one of these orders now mentioned by the Senator from Oregon presents a judicial aspect or presents an issue that is judicial in character in the sense that the court can deal with it to vindicate a right growing out of it or to redress a wrong imposed by it, it will do so. But if it is called upon to substitute its notions of policy and expediency for that of the Commission it will not do so. But if it is one of these matters, the manner of doing which lies in the wisdom and discretion of the Commission, the courts will not review or supervise the manner of its being done. My answer, generally, is, if it is a matter that does not involve the rate-making business, it may be of such a character that it will become a subject of judicial investigation.

I can not get any nearer to a definite answer than to say that each one of these orders would have to be determined on its own facts. But as to a rate-making provision, expressing the opinion derived from the uniform decisions of the Supreme Court of the United States, repeated so often, until now when it is necessary to refer to the doctrine, it is disposed of in a single sentence by the court, as it did in San Diego *v.* Jasper (189 U. S., 446), by saying:

> We do not sit as a general appellate board of revision for all rates and taxes in the United States.

The rate-making power, I think, is the principal feature of the pending bill. There are other abuses that ought to be corrected here. It may be some of these are of a judicial nature, but I do not pretend to go into that now. If I could, I would give to the court a right to dispose of such things as naturally and properly belong to it; but I do maintain, as earnestly as I can, that in the matter of rate making there is no room now for assuming that any feature of that duty can be referred to the courts to be passed upon in the nature of a review of the action of the Commission. In the first place, it would be folly to do it. The whole agitation connected with this question for a broad court review implies that the Commission is to be a mere figurehead; that its orders are never to amount to anything until permission to enforce the same is given by the courts. There is a popular belief, widespread in the community, that no legislative action ought to take effect on large interests until it has been subjected to the scrutiny and approval of the Supreme Court. The impression is general that Congress can not enact laws that large interests are compelled to obey in advance of judicial approval. Judge Brewer himself seems to have made a concession to that heresy in the opinion delivered by him in 183 United States, in the Kansas City Stockyards case, in which he intimated that because penalties would attach while litigation concerning the validity was pending there was reason for assuming that that feature of the act was unconstitutional.

IF COURTS CAN REVIEW EVERYTHING, NO PLACE FOR A COMMISSION.

Now, if it were competent for Congress to send the whole rate-making business to the court, there would be no sense in having a Commission to make the rates in the first instance, and we are guilty of the folly that it is said was once practiced by a King of England. He had two cats, a large one and a small one, and desiring to permit them to pass from one room to another, he had two holes cut through the wall, one large one for the large cat and one small one for the small cat. It is not necessary at all to have a Commission if the ultimate rate is to be made by the court, as it will be if the whole matter is to be remitted for revision to the judgment of the court. Then the proposition of the Senator from Ohio [Mr. FORAKER] would be the only logical and sensible one to adopt, and he would let the court take it up to start with. Proceeding with the citations from the decisions of the Supreme Court of the United States showing that the courts will not entertain jurisdiction to review any matter or question not of a strictly judicial character, I call attention to what is said in the case of the United States Commerce Commission *v.* Brinson (154 U. S., 482). It is there said:

> It is too evident for argument—

This is on the question whether or not the court will exercise anything but judicial duty—

> It is too evident for argument on the subject that such a tribunal is not a judicial one and that the act of Congress did not intend to make it one.
>
> The authority conferred on the respective judges was nothing more than that of a commissioner—

The quotation proceeds—

> The authority conferred on the respective judges was nothing more than that which constituted each then commissioner to adjust certain claims against the United States; and the office of judges and their respective jurisdictions are referred to in the law merely as a designation of the persons to whom the authority is confided and the territorial limits to which it extends. The decision is not the judgment of a court of justice. It is the award of a commission.

The court refused to entertain the appeal.

Mr. BACON. What is that case?

Mr. CLARKE of Arkansas. It is from Interstate Commerce Commission against Brimson, in 154 United States, page 482, the opinion being delivered by Mr. Justice Harlan, who quoted from the Ferreira case in 13 Howard, which I have just read.

The court also reviews three or four more cases on the subject where pension claims were referred to the court, but it decided that the questions involved were not judicial and declined to hear them. There is a very elaborate and learned opinion of Judge Gray on the same subject in the Supreme Court Reports of the State of Massachusetts. The legislature of Massachusetts imposed upon the supreme court the duty of appointing election commissioners. The court held that this was not a judicial duty, and declined to perform it. The case is reported as Supervisors of Elections, 114 Mass., 247.

Mr. FORAKER. Mr. President——

The VICE-PRESIDENT. Does the Senator from Arkansas yield to the Senator from Ohio?

Mr. CLARKE of Arkansas. Certainly.

Mr. FORAKER. I have been extremely unfortunate with respect to the Senator's speech, having been compelled to be out of the Chamber a good part of the time, to my misfortune, very greatly, I know. But I have come in at a very interesting time to me. I hope the Senator will allow me to interrupt him until I see whether I understand the point of the argument he is now making.

We are all agreed, of course, that a court will not undertake to discharge any but judicial duties, but do I understand the Senator to say that a court will not entertain a bill complaining of a rate that it is in excess of what may be a lawful rate, and grant relief, if it finds that the grounds of the bill are supported by evidence, in the way of enjoining all in excess of what is lawful?

Mr. CLARKE of Arkansas. The Senator understands me to say that when a commission, in the exercise of legislative power, fixes a rate, that the court can not do anything but strike the commission rate down entirely or let it all stand.

Mr. FORAKER. There was a time when I had that impression myself, but when I investigated this subject further I changed my mind about it.

Mr. CLARKE of Arkansas. I would be glad if the Senator would give me the benefit of his conclusion and the reason for it, and the legal authorities that produced the change.

Mr. FORAKER. It is all very clear in my mind that I was originally mistaken. If the Senator will allow me to put an illustration: I heard him a moment ago, when I was in the Chamber, before I was again called out of it, talk about making rates upon a mileage basis. Let us suppose that the commission be created, and that it be authorized to fix rates according to a mileage basis, and that according to the mileage basis prescribed by Congress a rate from one city to another on first-class goods should be a dollar. That would be mathematically calculated. The rate prescribed by Congress, therefore, by the commission, prescribed, I mean, by making the standard, would be a dollar. Now, suppose instead of that the railroads fix a rate at a dollar and a half, would not the shipper have a right, or would not the commission, if we authorized such a procedure, have a right on behalf of all the shippers thus interested to go into a court of equity and complain that the lawful rate fixed by Congress through the commission was a dollar, but that they were charging, notwithstanding that fact, in violation of law, a dollar and a half, and ask the court to enjoin all in excess of the lawful rate of $1. Would not the court have jurisdiction to grant that relief—not to make a rate, the Senator will observe, but to prohibit the road from collecting any but the lawful rate, to give effect by its order to the will of Congress?

Mr. CLARKE of Arkansas. I do not see that there is any question of making the rate involved in it. It is simply compelling, by mandatory proceedings, the carrier to comply with the law already made by the law-making power.

Mr. FORAKER. Would it not be competent, if we provided that relief might be by injunction, for the court to enjoin all in excess of the lawful rate? That is precisely what I am proposing to do in the amendment I have offered.

I am glad the Senator has taken up this subject, as I have a great number of authorities that I want to read to the Senate when I have an opportunity to do so, sustaining that proposition.

Now, if it would be clear, as it seems to me every Senator must concede it would be, that a court would have jurisdiction in the kind of a case I put, to enjoin all in excess of the lawful rate, surely it would have like power, if we conferred that kind of jurisdiction upon the court, to enjoin all in excess of what would be a just and reasonable rate, as to which the court would hear the testimony and determine, for that is but a judicial function as old as the administration of justice, what is just and reasonable whenever in the administration of the law a question of that kind arises, as it most frequently does in connection with the exercise of the police power.

Mr. CLARKE of Arkansas. The case instanced by the Senator from Ohio does not present the question of fixing the rate at all. It is simply a question of complying with the order made by the legislative commission. The court would not undertake to say whether it was reasonable or unreasonable, being a single rate, but would simply determine whether or not the Commission had prescribed that rate. That would be the judicial question.

Mr. FORAKER. I suppose the Senator would agree with me about that in the case put, the rate having been made by the Commission and the road not conforming to what the Commission required, or the Commission in the one case not having conformed to what Congress required, and I just wanted to ask him what difference there is in principle between resorting to the court for relief against a rate made by the railroad, having no commission whatever to make rates, and thus getting relief against unreasonable rates?

Mr. CLARKE of Arkansas. Nobody pretends that the railroad rates are legislatively fixed. Railroad-made rates are always open to attack in the courts by the shipper for unreasonableness. Nobody pretends that the railroads are in fact legislative bodies, although it is said they too frequently exert considerable influence on legislation.

Mr. FORAKER. They are not; but Congress passes a law saying that all rates shall be reasonable and just, and that anything in excess of what is reasonable and just shall be unreasonable and unjust——

Mr. CLARKE of Arkansas. That is the law.

Mr. FORAKER. And therefore illegal and unlawful.

Mr. CLARKE of Arkansas. That much would be the law without Congress reenacting it.

Mr. FORAKER. So it would. It is only declaratory of the common law. As a matter of policy we had already adopted that rule as applicable to the making of rates. But if Congress says that there shall be only reasonable and just rates made and enforced, any shipper has a right to complain that the rate he is required to pay is in excess of what the law authorized the railroads to collect. Therefore, the shipper under the law as it now is, can, in his own name, apply to any court of equity that has jurisdiction for relief against an extortionate rate. Certainly under the Elkins law either the shipper or a community will have a right, applying to the Commission, to have the Commission, if the Commission thinks there is reasonable ground for the complaint, to bring such a suit as that and seek that relief and secure it. That has been held repeatedly.

In the seventh Federal Reporter, and again in the eighth Federal Reporter, there are decisions to that effect, and in a number of other volumes there are cases to be found which sustain that proposition. I will not take the Senator's time now to cite those authorities, because it would be like making a speech in his time, but I want to call his attention to the proposition with the statement that I do desire to present that very point.

RAILROAD TOO POWERFUL FOR RESISTANCE BY INDIVIDUAL SHIPPER.

Mr. CLARKE of Arkansas. The courts have invariably taken the very widest liberty with the rates fixed by railroads in order to determine whether or not they are reasonable, but they have only occasionally done so, because the average shipper who complains finds that he loses if he wins; that the contest is an unequal one. He soon finds that he is engaged in a mighty poor business when involved in a controversy of that kind with a railroad, which has very largely the power of commercial life or death over him. So it is, in fact, an abstract right, and one that is very rarely ever resorted to.

Mr. FORAKER. On that I agree with the Senator precisely, and I think we should provide in this legislation for such an amendment of the Elkins law as will authorize all suits of that kind to be tried without expense to the shipper or without expense to the complainant, whether the complainant be a shipper or a community, broadening and strengthening that law in the way proposed, to reach every kind of rebate and every kind of discrimination, no matter whether between individuals or between localities.

Mr. CLARKE of Arkansas. The difficulty is that you thereby correct each rate, one at a time, whereas in the proposed legislation, if it should be perfected, we correct them in a body and to start with, and we fix a place by consulting which every shipper can know his own rate. We do not undertake to say that each rate shall be attacked by a shipper to-day or to-morrow or any other day. We provide for a legislative fixing of rates which is in effect a tax imposed on the business of transportation. A standard being fixed, the carrier knows to what it must conform. The individual rate payer and shipper is not compelled to antagonize the railroad by suing for the recovery of the few dollars they take from him wrongfully on each separate occasion. He is protected by public authority when he comes to deal with an institution that exists by public authority. There is no room for saying that because a shipper, without any legislatively established rates, can go into court and get relief against an excessive rate made by the carrier, that the remedy is adequate. We propose introducing an entirely new system. The courts have held that the carrier can be sued to recover excessive charges paid by a shipper, and in that controversy the question of the reasonableness of rates comes in. It is a judicial question.

Now we introduce a different policy. We propose by public authority to say in advance what the rate shall be. If its reasonableness is questioned, it can be attacked by the shipper before the Commission before it takes effect. It can be attacked by the carrier afterwards by showing that it is confiscatory. The pending legislation contemplates the introduction of a system of rate making by public authority. We have tried the other one long enough. At the present time the railroads understand the game better than the shipper. They are organized into five or six great systems in the United States. They have more power than any one shipper ought to be required to antagonize.

Mr. FORAKER. Mr. President——

The VICE-PRESIDENT. Does the Senator from Arkansas yield to the Senator from Ohio?

Mr. CLARKE of Arkansas. Certainly.

Mr. FORAKER. The Senator, I imagine, thinks a valuation of the property is necessary in order that there may be a standard according to which rates may be intelligently made?

Mr. CLARKE of Arkansas. Yes, sir.

Mr. FORAKER. Then, would not the Senator go one step further and have Congress prescribe what would be a just return on that property?

Mr. CLARKE of Arkansas. Yes, sir; I would.

Mr. FORAKER. I think that would necessarily follow.

Mr. CLARKE of Arkansas. I think that ought to be done, and it is a very serious objection to the pending bill that it does not provide that this shall be done. The distinguished Senator from Ohio has come very near to convincing many Senators that we will not have made a lawful delegation of power to the Interstate Railroad Commission by simply directing that Commission to prescribe rates that shall be just and reasonable. The command of the Supreme Court in such matters is that a delegation of legislative power to an administrative board will be sustained where it appears that Congress has legislated on every aspect of the matter so far as it is reasonably practicable to go, and that the thing or service delegated is the mere application to details of the rules and directions contained in the act. It is contended, and I think with much plausibility and force, that the delegation proposed in this instance is so broad as to amount to turning over to the Commission all the power and discretion that Congress itself has. That Congress has not only not legislated on the subject so far as it is reasonably practicable to do so, but has created no standard nor declared the policy, which as between several might be chosen, by which and upon which the so-called "just and reasonable rates" were to be ascertained by the Commission. The argument along this line of reasoning made by the distinguished Senator from Ohio commends itself very forcibly to me. But as the bill is full of defects, the forecast that its real meaning will be finally fixed by the slow procedure of the courts, is a matter that goes without saying. While settling other disputed questions, this will doubtless not escape attention. But I think Congress should now deal with the matter courageously and comprehensively, settling the basis of valuation and fixing itself the percentage of income which will satisfy the demands of just compensation.

Mr. FORAKER. I think the Senator is exactly right about it, if that is the kind of standard that he proposes to establish; but I call his attention to the fact that in determining that he will have to go still a step further and determine what shall be allowed for earnings and the betterments of the property, for replacements, for expenses, and for the salaries or wages of employees. It seems to me that is inevitable.

Mr. CLARKE of Arkansas. Would not the Commission have to do that anyway without any law directing them to do so?

Mr. FORAKER. I presume they would. I am not suggesting this in any controversial sense. I am only glad to see the Senator has such a broad and intelligent—for it is a broad and intelligent—view of the difficulties of this situation. It seems to me when we once embark upon it there is no end to it, as I have already had occasion to say heretofore.

Mr. CLARKE of Arkansas. The Supreme Court of the United States has fully determined that and decided that all of these things must be taken into consideration. The Commission can not fix rates until they find out how much the property is worth and what would be a fair return upon its value at the time the same is devoted to the service of the public, and there ought to be a fair return upon it.

Mr. FORAKER. The Senator, I trust, will allow me to ask him one other question. I hope he will not think I am doing it except only to get information. What return does the Senator think the railroad ought to be allowed to have?

Mr. CLARKE of Arkansas. I have said that in Arkansas I would make it 6 per cent, or something like that.

Mr. FORAKER. I remember that Governor Cummins, when he was before our committee, testified that he thought, in view of the fact that as the business in some years was bettetr than in others, the railroads might be allowed to earn as much as 7 per cent.

Mr. CLARKE of Arkansas. I should not object seriously to that. In a State like Arkansas, where we do not have all the railroads we want, I should like to have the returns sufficiently large to encourage the building of new lines. But I should want that 6 per cent calculated on the actual value of the property employed, and not on watered stock or fictitious bonds which the companies may issue from time to time. I should demand that this valuation be honestly and intelligently ascertained, after full opportunity to both sides to be heard in the inquiry. On the value of the property thus made I should fix the percentage of income deemed reasonable. I do not think we can expect investors to engage in a business unless there is definite prospect of getting a fair profit out of it. But even on this basis of 6 per cent, which is nominally more than the railroads claim to be now making, as it is said that 4 per cent is the measure of profits derived from the business of transportation, the public would be taxed less than two-thirds the sum paid under existing railroad-made rates. It must not be overlooked that the apparently moderate income of 4 per cent is computed on a valuation of $65,000 per mile, whereas the average actual value of the railways, the entire country considered, does not greatly exceed $25,000 per mile.

Mr. FORAKER. Mr. President, I call the attention of the Senator to what is the popular belief, at least, as I understand it, that there are some railroads that are worth a great deal more than the aggregate of their stocks and bonds. That, I believe, is true of the Pennsylvania Railroad. It is also true of the Illinois Central Railroad, of the New York and New Haven Railroad, and possibly of some other railroads. Has the Senator thought of what he would allow them? They are now paying 6 per cent to their stockholders, and after paying whatever operating expenses and fixed charges they may have they are devoting the balance to the improvement and extension of their property. What would the Senator do in a case like that? I do not ask this to perplex the Senator, but it perplexes me, and I ask the question in good faith.

WHAT TO DO WHERE RAILROAD VALUE GREATER THAN AMOUNT OF STOCKS AND BONDS.

Mr. CLARKE of Arkansas. It does not perplex me for one moment. I would give them that return upon the real value of the property employed in the public service. The amount of bonds and stock certificates outstanding is a circumstance of secondary importance and not at all of controlling influence in fixing the value of the property. The carrier is entitled to just compensation for the use of its property at the time the same is employed in the service of the public. This compensation is to be computed on the basis of the value of the property and at the time employed. The carriers have a right to demand this, and the public must submit to a tax on transportation adequate to this purpose. This return can not be made less to a given carrier because its bond and stock issues are less in nominal amount than the sum of the value of its property employed in the business of public transportation. Nor can the public be taxed in a sum in excess of what is adequate to satisfy the demand for just compensation for the service rendered, computed on the basis of the value of the property of the carriers, and at the time employed in such business, by reason of the fact that a given carrier has outstanding a bond and stock issue for a nominal sum in excess of the value of its property so employed on behalf of the public.

The right and duty to regulate the extent of the tax to be imposed on the business of transportation by the carriers engaged therein is a governmental function, to be exercised with due regard to the interests of both the carrier and the public. The right to regulate the amount of stock and bonds to be issued is, almost necessarily, merely a matter of private contract and arrangement between the railroad corporations and those who invest in the stocks and bonds so issued. The public as a whole have nothing to do with the matter. The carrier corporation has a right to demand just compensation for the use of its property employed in the business of public transportation, computed on the valuation of its property so employed, and at the time so employed, regardless of the amount of its debts, bonded or otherwise, or the number of its shareholders. On the other hand, the business of transportation can not be taxed beyond the limit of what is just compensation, computed in the same way, to supply deficiencies in the income of a carrier whose stock and bond issues exceed in nominal amount the value of the carrier's property so employed in the service of the public. This is the doctrine of the Supreme Court of the United States.

Mr. FORAKER. It is fortunate for the stockholder who may get 10 per cent on his stock.

Mr. CLARKE of Arkansas. That is all right, provided the public is not taxed any more than it ought to be taxed for the use of the property of such companies.

Mr. FORAKER. Mr. President, If the Senator will not think I am imposing on his good nature, I wish to ask him what he would do with the railroads that are worth more than their stock and earn more than, say, 6 per cent, and what we would do in the case of railroads that do not earn 6 per cent, or 5 per cent, or perhaps do not earn anything?

Mr. CLARKE of Arkansas. The latter class should be turned over to somebody who can operate them and make something out of them. That is my answer to that.

Mr. FORAKER. That is not an idle question at all. There are railroads in the country that are not making anything beyond their operating expenses, and yet they are railroads that cost a great deal, but built in the hope that business will develop some time in the future, and that they will ultimately have a profitable return. What would the Senator do in the meanwhile if they raised the rate and drove people off to another line to get them back again?

Mr. CLARKE of Arkansas. Of course there are some phases of every question which can not be forecasted definitely, and as to which we can not upon the instant suggest a complete scheme of adjustment, and the case mentioned by the Senator may be one of these. If a railroad was built where one was not needed, where there was no business, and nobody to employ it, I do not know how it would ever get a profit. You will have to settle that to your own satisfaction. Everybody may have a different opinion as to how that might be remedied. Congress can not devise any; and for that reason it does not now present a very serious practical difficulty. If a railroad company intends to occupy a particular field and keep competitors out, and for that reason builds a railroad for such tactical purposes, and from which it does not expect to get any profits except in an indirect way in protecting its system zone assigned to it in a general division of the territory, it might be that it would be able to arrange some scheme by which the stockholders could be taken care of.

Mr. FORAKER. There are a great many railroads, as the Senator is aware, that are built through a country which is not thickly settled, where there is but little business, where there is but small population, which are not, when first opened for business, profitable roads, but losing roads, and as it has been in the past it will doubtless be, though perhaps to a less extent, in the future. A railroad is sometimes improvidently laid out. If it is driven out of business by some other road, it does not need any sympathy; but where people have undertaken to develop a country and reach points that ought to have the benefit of railroads, it seems to me it is one of the troublesome questions that we are now confronted with. The Senator will pardon me, but his frank talk upon the subject and his frank admissions started all these suggestions in my mind. I do not mention them in order to in any way annoy the Senator——

Mr. CLARKE of Arkansas. I am not annoyed in the slightest.

Mr. FORAKER. Though I have thought of them. I know I could not have annoyed the Senator even if I had wished to. I do it because they are legitimate, and in order that I may in that practical way call the attention of the Senate to the fact that we are embarking in a business that will give us a good many anxious hours if we once get started in it.

Mr. CLARKE of Arkansas. In nearly every question calling for legislative action situations can be imagined which, should they ever actually arise, would make the law inequitable.

Those exceptional imaginary cases are to be expected to appear in any argument, and the ingenuity of those who antagonize proposed legislation in presenting them is proverbial and is complimented; but they generally do not control. They are very exceptional and enter so slightly into the general affairs of life that they can not deprive others of what is obviously their due simply because they may in an isolated and rare instance fall a victim to an otherwise wholesome law. The Commission has a discretion to take into consideration all of the circumstances that fairly enter into the solution of the problem submitted to its jurisdiction, and I take it for granted that in each one of these cases it will design some feasible remedy having reference to the rights of the carrier and the rights of the public. There may be a situation imagined, or it may be that a railroad may be found, as to which no rate that the traffic could afford to pay would be compensatory. In that event that enterprise would be declared a pecuniary failure and the ordinary laws of trade would govern in its liquidation. The case is exceptional; the remedy must likewise be.

THE DUTY OF CONGRESS NOW.

But I have abused the forbearance of the Senate long enough. I have attempted to show that the evil with which we are dealing is a large one; in fact, constitutes the fundamental perversion of economic laws, dominated by skilled operators and inspired by the avarice-mad spirit of the times, and out of which grows nearly all of the other parasites which so sorely afflict the commercial and industrial interests of the land. A sovereignty must so frame its laws as to attain its ultimate purpose to preserve and perfect itself. The law's aid is the due of the weak and disorganized when their interests are being invaded and their rights are being destroyed by the multiplied power of the few and mighty, bound together by the cohesive incentive of power and profit, and rendered submissive and loyal to a common direction under the conviction that disturbance of their plans is a radical and dishonest assault upon their vested rights. The very magnitude of the evil, and the almost universal extent to which the commercial fabric of this country is now interblended with its ramifications renders legislators conservative, and even restrains them unduly with a sense of hesitation when they stand in the presence of the true proportions of the situation and are confronted with a realization of the consequences which are to follow the application of any real and effective remedy.

Notwithstanding they are advised that the present organized and determined voice of public opinion is addressed to them as a command to put a stop to existing abuses, they stand dismayed, and, yielding to a spirit of indecision, manifest a want of courage in adopting a policy that will effectuate the end desired. The value of caution and conservatism in matters of legislation is never to be underestimated, nor yet must it be overlooked that the beneficiaries of abuse have no more effective weapon in their entire armament when engaged in diverting and defeating efforts to formulate and apply remedies for wrong widely practiced and strongly intrenched. The general prevalence of this spirit must account for the scant and imperfect response that is to be made to the present demand for effective regulation of the transportation business of the country. Nominally the public demand for action has been complied with, but I believe time will show this has been done in a way that will perpetuate the evils complained of, and go no further than to make necessary slight changes in the methods by which these things are done.

I am among those who believe that the better course is to deal comprehensively and courageously with the whole subject. That Congress should take upon itself the responsibility of providing a Commission made up of men possessed of sufficient character and intelligence to invest their official action with the verity and respect due to a tribunal of the highest order; that it should be equipped with all the accessories necessary to enable it to investigate thoroughly and to judge intelligently and impartially; that the law should be so framed as to assume that the Commission would understand that it had no power to invade the constitutional right of the carrier by depriving it of the right to just compensation for the use of its property, to be based and estimated upon the value of that property at the time it is employed on behalf of the public and would act within the limits of its powers; that no presumption should be indulged that the Commission, through ignorance or evil design, would invade this right of the carrier, and that therefore its judgment ought to be permitted to stand until it has been made affirmatively to appear in a judicial tribunal of original jurisdiction that such has been the case. I believe that the right to issue a preliminary injunction has been greatly abused in this country, even when employed as a remedy to restrain the alleged wrongdoing of individuals in their dealings with one another, and I believe that the right to issue such an injunction has no rightful place in any scheme having for its purpose the accomplishment of the thing we have in hand at this time. It is utterly out of place, and an enlightened and comprehensive understanding of the things that it should be our purpose to accomplish will convince anyone that its suspension here will inflict no injustice upon the interest involved.

Mr. TILLMAN. Mr. President, I have notice of one more prepared speech on the pending bill. The Senator from Virginia [Mr. DANIEL] wishes to take the floor to-morrow. The Senator from Minnesota [Mr. NELSON] has indicated to me that he wants to make a short speech; but I presume after to-morrow we will not be likely to have any more long speeches. I therefore think that it is now time for us to get an agreement about a vote. So I wish to propose that on the 9th of May—a week from Wednesday—we make final disposition of the bill and all amendments then pending. In order that the Senate may understand the line of disposition of the amendments, I send to the desk a tentative proposal for unanimous consent.

The VICE-PRESIDENT. The Secretary will read the proposed agreement.

The Secretary read the proposed agreement, as follows:

It is agreed, by unanimous consent, that on Tuesday, May 1, 1906, general debate shall be concluded upon the bill H. R. 12987, "An act to amend," etc.; that on May 2, and upon the next succeeding legislative days until Wednesday, May 9, 1906, immediately upon the conclusion of the routine morning business, the Senate will proceed, under the ten-minute rule, to consider and vote upon amendments that may be offered to the bill; that on Wednesday, May 9, 1906, upon the conclusion of the routine morning business, the Senate will proceed, without further debate, to vote upon such amendments as may then be pending or as may be offered, and will vote upon the bill itself before adjournment on the said last-named day—May 9, 1906.

Mr. ALDRICH. I see no occasion for agreeing that what is called "general debate" shall cease to-morrow or at any time in the near future. In the first place, we have never in the Senate recognized "general debate." That is a House term. I would suggest that there will probably be no disagreement as to fixing a time for a final vote on the bill for Wednesday, May 9; but I see no reason for making the disposition of time proposed by the Senator from South Carolina, commencing to-morrow or the next day. I imagine that what is called the "general discussion" on this bill is practically closed, and that we may find ourselves in a position where no one will be ready to speak. Certainly the business of the Senate ought not to be delayed by reason of the fact that we have fixed a time for a vote. There is one important appropriation bill now before the Senate, or it will be within a day or two, and I think that we ought simply at this time to fix a time for a final vote, leaving the disposition of matters between now and then to whatever shall be the pleasure of the Senate or whatever is necessary to be done in connection with this bill.

Mr. TILLMAN. That is entirely agreeable to me, Mr. President. My only solicitude has been that if we are going to discuss the amendments, as we doubtless will, and there are some sixty or seventy of them—I have not been able to keep tab on them, they have been coming in so rapidly—I was going to say, unless we can understand that as soon as we have discussed them and any amendment any Senator desires to present and wants to speak on under the ten-minute rule, unless we can kill that amendment then and there or put it in the bill, we will lose time. That is the reason I want three or four or five days for that kind of procedure, because there are some very important amendments pending, and they will take a considerable amount of discussion, and probably will consume all that length of time.

I would say to the Senator from Rhode Island that if there shall appear to be a lapse or a lack of discussion the appropriation bills can always be brought forward. I would have no objection to that. If the Senate will agree to the 9th of May, the intervening time can be disposed of by the Senate to suit itself. I suggest the 9th of May, at 2 o'clock.

Mr. ALDRICH. Any time that——

Mr. TILLMAN. The voting to begin at 2 o'clock.

Mr. ALDRICH. That is right. I think it ought to be understood, however, that in the time between now and then, whenever there is anyone who wants to speak or there is any disposition to discuss the bill, it should have the right of way.

Mr. TELLER. And all amendments.

Mr. ALDRICH. The bill and all amendments should have the right of way. I would be perfectly willing to have an understanding that on three days of next week—that is, Monday, Tuesday, and Wednesday—up to the time of voting, the discussion should proceed under the ten-minute rule.

Mr. FORAKER. I suggest that it be under the fifteen-minute rule.

Mr. ALDRICH. Very well; under the fifteen-minute rule.

Mr. FORAKER. Some of the amendments are very important, and it would be very difficult to present them in fifteen minutes. It may be that during this week all the important amendments can be presented. I want to speak longer than ten minutes on some amendments.

Mr. TILLMAN. Does the Senator from Rhode Island consider that Saturday, Monday, Tuesday, and Wednesday would be too much time to devote exclusively to amendments?

Mr. ALDRICH. I think that three days of next week will be sufficient under a limited rule. They can also be discussed this week.

Mr. TILLMAN. We might meet earlier. We could come here at 10 o'clock, if need be, or at 11 o'clock.

Mr. ALLISON. Mr. President——

The VICE-PRESIDENT. Does the Senator from South Carolina yield to the Senator from Iowa?

Mr. TILLMAN. Certainly.

Mr. ALLISON. It seems to me that the suggestion made by the Senator from South Carolina, that after to-morrow unlimited debate shall cease, and between that time and the day of voting there shall be an understanding that ten or fifteen minute debates may be indulged in by Senators on amendments, is a good one. I think very likely there will be some amendments that ought to be debated.

Mr. ALDRICH. I am afraid that we will cut off some Senators who desire to speak, like the Senator from Virginia [Mr. DANIEL].

Mr. ALLISON. Very well, then, Mr. President——

Mr. ALDRICH. I think we should keep the debate open this week as it is.

Mr. TILLMAN. The Senator from Virginia has already given notice of a desire to speak to-morrow, and there is no intention or desire to cut him off or to limit him.

Mr. CULBERSON. Mr. President——

The VICE-PRESIDENT. Does the Senator from South Carolina yield to the Senator from Texas?

Mr. TILLMAN. Certainly.

Mr. CULBERSON. I understand the Senator from Iowa [Mr. ALLISON] has the floor.

The VICE-PRESIDENT. The Senator from Iowa has the floor by courtesy of the Senator from South Carolina [Mr. TILLMAN].

Mr. CULBERSON. I simply desire to say, for the information of Senators, that I am advised that probably there will yet be several general speeches delivered on this bill, and I think it would be inadvisable to press the request for unanimous consent that the general debate should close on to-morrow. For one, I will speak plainly that I can not consent.

Mr. TILLMAN. I am perfectly willing to have a vote on Wednesday, the 9th, and let the Senate take care of the intervening time.

Mr. GALLINGER (to Mr. TILLMAN). That is what you ought to do.

Mr. TILLMAN. All I am after is to get the thing wound up and finished.

Mr. ALLISON. If that is the general sentiment of Senators, I shall not object to it; but I do think there should be a limited time for brief debate upon the amendments. It has been our experience in the past that we have been compelled to vote upon important amendments without an opportunity of having them explained. But I am content with whatever Senators think is the wise thing to do. I want, Mr. President, to have an end to this bill at the earliest possible time.

Mr. ALDRICH. Will the Senator from Iowa consent to fifteen-minute debate for all of next week?

Mr. ALLISON. Certainly; I will consent to almost anything. I would be willing to close up this matter without further debate. However, if we do not make some arrangement respecting it, we shall occupy the whole of this week in general debate, which I am perfectly willing to consent to; but I think that this bill should be out of the way before we engage in any other extended business.

Mr. LODGE. Mr. President——

The VICE-PRESIDENT. Does the Senator from South Carolina yield to the Senator from Massachusetts?

Mr. TILLMAN. With pleasure.

Mr. LODGE. It seems to me that it is very important in making this arrangement that we should avoid banking all these amendments to be voted on at the last moment. Then a great many amendments will be brought forward and presented to the Senate when not a word can be said either in opposition to or in favor of them. I think there ought to be a certain number of days allotted to the consideration of and voting on amendments. To bank them all up on the last day, as is now the practice whenever we make a general agreement, I think would be very unfortunate. I like the form of the request of the Senator from South Carolina as he sent it to the desk, though I think if he fixes the date on Thursday and we devote every day of next week to the consideration of amendments it would be better.

Mr. BEVERIDGE. Mr. President——

The VICE-PRESIDENT. Does the Senator from South Carolina yield to the Senator from Indiana?

Mr. TILLMAN. Yes.

Mr. BEVERIDGE. I think it is perfectly apparent that the remainder of this week under general debate will take care of itself in the good discretion of Senators; but in view of the large number of amendments, the very great importance of a large number of those amendments, the desire of Senators to discuss them and of other Senators to hear them discussed, and in view of the fact that we have all spent so much time upon this bill, I suggest that the remainder of this week be devoted, as it is, to general debate on the unfinished business, and that all of next week, beginning with Monday and ending with Saturday, at which time we take the vote——

Mr. GALLINGER and others. Oh, no.

Mr. KEAN. Make it the 9th. Do not put it off another day.

Mr. BEVERIDGE. So far as I am concerned, I am making the suggestion, and the Senator can object; but it seems to me when we are coming to a final discussion of the amendments themselves, it is more important to add one day or two days than it is to subtract one day or two days.

I think further, Mr. President, that debate under the ten-minute rule upon amendments such as are offered to this bill, is a far too limited debate. There is hardly a Senator here who can discuss one of the amendments as he wishes to discuss it, or as the Senate wishes to hear it discussed, under the ten-minute rule. It ought to be not less than twenty-five minutes. So I suggest, as a basis of modifying what has already been suggested, that the remainder of this week be devoted to general debate and that all of next week be devoted to amendments, to be taken up and discussed under the thirty-minute rule or the fifteen or twenty minute rule, but certainly not under the ten-minute rule, and that they be voted upon as soon as the discussion upon each of them is completed. What does the Senator say to that?

Mr. TILLMAN. I still stick to my original proposition, if I can get the Senate to agree to it, but I am unwilling to go beyond the 9th of May for the final vote. In the meantime the Senate can control everything in its own way. We start in the morning. If there are any set speeches on hand let them be delivered, and if there are no such speeches, some Senator can call up an amendment, and when we get through the discussion of that amendment we can vote on it then and there.

Mr. BAILEY. Mr. President——

The VICE-PRESIDENT. Does the Senator from South Carolina yield to the Senator from Texas?

Mr. TILLMAN. With pleasure.

Mr. BAILEY. I was about to suggest that we first agree to vote on the 9th of May. Let that question be settled, and then it will be an easy matter, as soon as the general debate has been exhausted, to take up the amendments and discuss and dispose of them as they always are discussed and disposed of here.

Mr. BEVERIDGE. Will the Senator consent to vote on the 10th and devote three days next week to the amendments?

Mr. BAILEY. The Senator from South Carolina has that matter in charge. If that is not agreeable, then I suggest that, beginning on Saturday, we take up the amendments, discussing them and disposing of them as we proceed with them, under the fifteen-minute rule. Ten minutes is the usual limit; but, acceding to the suggestion of the Senator from Ohio [Mr. FORAKER], I make the suggestion that the vote be taken on Wednesday, May 9, beginning at 2 o'clock in the afternoon; that beginning on next Saturday morning the amendments be taken up, considered under the fifteen-minute rule, and disposed of as they are considered.

Mr. ALLISON. Does that mean that during all of next week the amendments shall be disposed of as they are reached?

Mr. BAILEY. As they are reached.

Mr. ALLISON. Under the fifteen-minute rule?

Mr. BAILEY. Yes.

Mr. ALLISON. Now, if the Senator will allow me to make one other suggestion, there should be, it seems to me, some rule as respects amendments. There are forty or fifty amendments pending to the bill.

Mr. GALLINGER. Sixty-odd.

Mr. ALLISON. Sixty-odd——

Mr. TELLER. Seventy.

Mr. ALLISON. Seventy, we will say, and I do not know

how many more that are to be projected later. I think the wisest way to dispose of these amendments will be to take up the bill by sections in their order, and dispose of the amendments to each particular section. Otherwise we shall have a scramble here about amendments and confusion that will occupy time that ought to be occupied in intelligent debate.

Mr. BAILEY. I think that is an excellent suggestion; but we, of course, must have it understood that if we reach 2 o'clock without having disposed of the amendments, they will then be still subject to a vote. That will give every Senator a vote upon his amendment.

Mr. MORGAN. Mr. President——

The VICE-PRESIDENT. Does the Senator from South Carolina yield to the Senator from Alabama?

Mr. TILLMAN. Certainly.

Mr. MORGAN. Mr. President, the suggestion made by the Senator from Iowa [Mr. ALLISON] a moment ago is, I understand, exactly in conformity with the parliamentary law that controls bills before this body. The pending bill was reported here without any amendments having been suggested to it by the committee. Therefore there is no preference to be given to one amendment over another in respect to the time of its consideration.

The parliamentary law, as I understand it, Mr. President, the universal usage in the parliamentary bodies of England and the United States, is that a bill, after it has been read, shall be taken up by sections for amendment, and each section passed upon, and the amendments thereto discussed, considered, and voted upon. I am perfectly willing that that rule shall be observed so far as I am concerned. That, of course, terminates general debate, as we call it, whenever we agree to take up the bill for amendment, read the sections from first to last consecutively, and call for amendments to each section as it is reached. That will terminate the general debate. Then, if Senators want a limitation upon the time for the discussion of the amendments, respectively, as they are presented, the Senate can agree upon that, of course.

But I venture to suggest that when we have a motion to lay on the table, which cuts off debate, that it is quite easy to dispose of all amendments by that motion. If they are laid on the table, they are ended, and if they are kept up for consideration by refusal to lay on the table then we understand that that is an important matter upon which a vote by yeas and nays is going to be taken. I think there is ample power in the Senate in the use of that motion to control the time upon the discussion of amendments, and it ought to be freely resorted to. No Senator ought to feel at all discommoded or sensitive because another Senator chooses to try to bring debate to a close by a motion to lay on the table. If we go at it in that way, the only thing, it seems to me, that is necessary to be done is to recognize that rule and to agree on a day when we will take up the bill to be considered, section by section, with the amendments thereto.

Mr. BACON. We are unable to hear the Senator from Alabama, and we would like to very much, because he is proposing what we will have to agree to or disagree to.

Mr. MORGAN. I was merely suggesting, I will say to the Senator from Georgia, that I am perfectly willing to fix a day—I do not care when it is; to-morrow, so far as I am personally concerned—when the bill shall be taken up and be read by sections for amendment; each section read and disposed of, with all the amendments pending or that may be offered to it; get through with that, and go on to the next. That will bring the conclusion of this debate very much sooner than we can reach it by any agreement we may make here, because I would not consent to naming to-day a day when the final vote on this bill shall be taken.

I believe a final vote will be reached earlier if we pursue the course suggested by the Senator from Iowa than in any other way we may possibly deal with this matter. Therefore I may be considered to be here as objecting to fixing a day for a final vote on this bill. The final vote will come when the amendments are disposed of.

Mr. ALDRICH. This discussion has shown the wisdom of the suggestion made by the Senator from Texas [Mr. BAILEY], that we first agree upon a time for taking the final vote, and then let us see if we can agree upon the details as to what shall be done between now and then.

Mr. MORGAN. I shall object.

Mr. ALDRICH. I hope the Senator from South Carolina will confine his present request to asking that a day be fixed for a final vote.

Mr. TILLMAN. Very well. I ask unanimous consent that Thursday, the 10th, be fixed as the day when we shall take a final vote on it.

Mr. MORGAN. I object, Mr. President.

The VICE-PRESIDENT. Objection is made to the request of the Senator from South Carolina.

Mr. LODGE. Mr. President, I think it is perfectly obvious that the agreement on the amendments must go with the agreement on the final vote. Can we not agree that on Monday next we will take up the bill, to be read section by section for amendment, the debate to proceed under the fifteen-minute rule, and that on Thursday, at 2 o'clock, the final vote be taken on the bill and all amendments still remaining or to be offered?

Mr. BACON. Mr. President, I am quite agreeable to the fixing of any date Senators may desire. I am willing that it shall be either the 9th or the 10th. I think, however, from what we have seen heretofore when a definite hour has been fixed for voting on an important measure, that it is better simply to fix the day instead of fixing the hour. I do not say this because of any disposition to delay the vote. I am willing to agree to that day or an earlier day. I think it would be better to fix simply the day, and say we will vote on that day. Senators will all recollect the fact that when we have had important legislation here, as suggested by the Senator from Iowa, in the last moment amendments are crowded in, and even after the voting has begun amendments are offered, and Senators are required to vote yea or nay without being able to state the reasons which actuate them in the giving of that vote. I do not know what amendments are going to be offered. There are some as to which, if they are offered, I desire to be able to state the reason why I shall vote one way or the other.

Mr. LODGE. Under my proposition and under the proposition of the Senator from South Carolina there would be three days for that purpose. The Senator from South Carolina proposed a week.

Mr. TILLMAN. This week and all of next week, up to the day of voting.

Mr. LODGE. I propose three entire days to take up and dispose of amendments, and we ought to reach 2 o'clock on Thursday with the amendments pretty thoroughly disposed of.

Mr. BACON. The Senator also proposed, if I understood him correctly, that at 2 o'clock we proceed to vote upon the amendments offered and to be offered.

Mr. TILLMAN. That has to be there.

Mr. LODGE. That has to be in, of course.

Mr. BACON. That is the reason why we should have a day rather than an hour fixed.

Mr. LODGE. We are to have three days not only to discuss, but to dispose of amendments, and by that time we shall have disposed of most of them. And, moreover, I think it would be very unfortunate not to fix an hour, because that may drag it out a day or two with recesses.

Mr. BACON. Not at all. The Senator says we will have three days in which to dispose of amendments. Those three days will certainly not be devoted to the consideration and discussion of amendments offered after 2 o'clock on Thursday, if 2 o'clock is the hour fixed for a vote. And for that reason I think it would be better not to fix an hour. I think by having several days devoted to the consideration of amendments, most of the subjects upon which amendments will be offered will have been very fully discussed, and possibly there may not be many amendments thereafter offered.

Mr. LODGE. But we are to vote all through those three days.

Mr. BACON. That is true; and for that reason there will be very little left to offer amendments upon or to discuss after 2 o'clock on Thursday, but it may be very important that it should be done.

Mr. TILLMAN obtained the floor.

Mr. HALE. Mr. President——

The VICE-PRESIDENT. Does the Senator from South Carolina yield to the Senator from Maine?

Mr. TILLMAN. With pleasure.

Mr. HALE. May I ask the Senator how he proposes to take up the time, on the last suggested proposition, for the rest of the week, between now and Saturday? How many reluctant Senators has he on his list who desire to be heard?

Mr. TILLMAN. I have heard of only two. It seems it is almost impossible to get a unanimous-consent agreement, though I am going to try once more, and then I will notify the Senate as to what my plan will be.

I again ask unanimous consent that we take the final vote on this bill and all amendments pending thereto or to be offered on Thursday, the 10th of May, beginning at 2 o'clock.

Mr. MORGAN. I am willing to fix any day anybody may name for taking up this bill and considering it by sections for

amendment, but I will not consent to fixing a day for a final vote on the bill.

The VICE-PRESIDENT. The Senator from Alabama objects.

Mr. TILLMAN. The Senator has a right to object, and therefore I recognize my duty, and that is to notify the Senate that every hour, after the morning business is over, I am going to keep this bill before the Senate, if the Senate will back me in that, and I will keep it there until we get a vote on it.

Mr. MORGAN. That is all right.

Mr. HALE. The Senator can do that; and the only way is to ask that the Senate proceed to vote on whatever amendment is pending, if no Senator is ready to go on and speak. The Senator has found a solution of this whole business.

Mr. TILLMAN. I will try to get unanimous consent.

Mr. HALE. Will the Senator wait a moment?

Mr. TILLMAN. Certainly.

Mr. HALE. If the Senator, when this bill comes up, will see whether any Senator desires to go on and debate it in his own way, which we can not restrain—we never have—and if nobody is ready, the Senator will then invoke the assistance of the presiding officer and ask what amendment is pending, and push the matter to a vote, he will soon be out of the woods.

Mr. TILLMAN. I was going to ask now for unanimous consent that whenever this bill is before the Senate and any amendment is offered we shall vote on that amendment as soon as we have discussed it.

Mr. HALE. The Senator does not need to ask that.

Mr. TILLMAN. No; but I want to get an agreement on that, because some man may turn in and go to speaking by the hour in order to kill time.

Mr. HALE. That you can never hinder. But if the Senator will insist, when the time comes and the bill is before the Senate, that either some Senator shall go on and debate it in his own way or that the Senate shall vote upon the pending amendment, I say he will soon be out of the woods.

Mr. TILLMAN. I have already given notice that that is my purpose after to-morrow.

Mr. NELSON. I want to suggest to the Senator from South Carolina that the next parliamentary stage of this bill is to read it for amendment. It has not been read for amendment, and the next step is to call it up and have it read for the purpose of amending it in Committee of the Whole. If the Senator follows that step, we can take up these amendments one by one and dispose of them.

Mr. TILLMAN. As they are offered.

Mr. NELSON. As they are offered.

Mr. FRYE. Why can it not be agreed that whenever the amendments are reached for consideration the debate on the amendments shall be under the ten or the fifteen minute rule?

Mr. TILLMAN. I would be glad to get an agreement to that effect.

Mr. FRYE. Can you not get that?

Mr. TILLMAN. I will try.

Mr. BACON. I suggest to the Senator that possibly it might be well to modify the request so as to give the proponent of an amendment a little more time than other Senators who may wish to discuss the amendment.

Mr. TILLMAN. I have never found that any man who had anything to say here could not get all the time he wanted. It is only when he is long-winded and is full of words without ideas that people do not want to hear him.

Mr. BACON. I presume the Senator is correct, but his suggestion can not be applicable to me.

Mr. TILLMAN. I am not applying it to anyone. The Senator is too thin skinned if he applies that to himself, because he gives us a great deal of pleasure when he speaks.

Mr. BACON. The Senator from South Carolina is indulging in euphemisms, as he usually does. Nevertheless, I want to say what I was about to say when the Senator interrupted me, that whatever may be the disposition of the Senate to give to an interesting speaker all the time he desires, if there is a unanimous-consent agreement that debate shall be limited to fifteen minutes that desire on the part of the Senate could not be gratified.

Mr. TILLMAN. Except by unanimous consent.

Mr. BACON. We do not ingraft one unanimous-consent agreement upon another unanimous-consent agreement. When we make a unanimous-consent agreement, it is considered in the Senate as the most binding of all proceedings and is most scrupulously regarded by all Senators as something the binding force of which may not thereafter be called in question by any subsequent occurrence or occasion. While, of course, I will not press the suggestion at all, and I do not know that I should avail myself of it, even if the proposed unanimous-consent agreement should be modified, it does look as if possibly there might be some propriety in the suggestion that the proponent of an amendment might require a little more time to properly present it to the Senate than those of us who might desire to follow him in the discussion.

Mr. TILLMAN. If it is the desire of the Senate to give the mover of an amendment longer time than anyone else, I am perfectly willing.

Mr. BACON. Only for the original presentation of it. I do not mean in the subsequent discussion.

Mr. TILLMAN. I do not believe the Senate will agree to it.

Mr. FRYE. Have we not had amendments pretty thoroughly discussed already during this debate, and if we are ever going to be familiar with the rate bill is it not possible that we may be reasonably familiar with it by this time? I hope the Senator will ask unanimous consent that a day be fixed on which to start with the amendments, because every Senator desires to be here when the amendments are under consideration. Suppose the Senator asks that next Friday or next Saturday or next Monday——

Mr. TILLMAN. I will make another effort to get unanimous consent. I ask unanimous consent that on Wednesday——

Mr. FRYE. What?

Mr. TILLMAN. That on Wednesday, the coming Wednesday, day after to-morrow——

Mr. FRYE. That is first rate.

Mr. TILLMAN. The Senate proceed to the consideration of amendments to this bill.

Mr. FRYE. Under the ten-minute rule.

Mr. TILLMAN. Under the fifteen-minute rule.

Mr. CULBERSON. Mr. President, I stated a while ago to the Senator from South Carolina that I was advised that some Senators desire to speak longer on the general bill than fifteen or twenty minutes.

Mr. TILLMAN. I will say Friday.

Mr. CULBERSON. Wednesday is too early.

Mr. FRYE. Make it Monday.

Mr. LODGE. Make it Monday.

Mr. FRYE. Make it next Monday.

Mr. TILLMAN. I will try Friday. I ask unanimous consent that on Friday next the Senate will proceed to the consideration of this bill, taking up the amendments as they are offered and disposing of them after discussion under the fifteen-minute rule.

Mr. BACON. I suggest to the Senator that the suggestion of the Senator from Minnesota [Mr. NELSON] is the proper one, that the bill be taken up in its regular parliamentary stage.

Mr. ALLISON. By sections.

Mr. BACON. By sections rather than that amendments should be disposed of as offered.

Mr. TILLMAN. There are so many cooks that I can not keep up with the suggestions as to where to put the pepper and the salt, but I will agree to anything the Senate will agree to.

Mr. ALDRICH. Two or three suggestions have been made, one by the Senator from Georgia and another by the Senator from Iowa, that we take up the bill in proper order. The custom of the Senate is that when a bill is reported it is read for amendments. The committee amendments are acted upon first. If there are no committee amendments, as there are none in this case, amendments are offered to the bill generally. Of course you can not preclude a Senator from offering an amendment to the first section after all the sections have been read. Amendments are not only in order after that time, but they are in order in the Senate. That has been the parliamentary rule.

So I see no particular value in the suggestion that we agree to follow that course—that is, that after the bill has been read through, section by section, any amendment shall be in order to any section of the bill, and that when one is offered to the first section and is disposed of, we will, in like manner, go through the whole twenty sections, or whatever number of sections there are, and after the twentieth section has been disposed of any Senator may offer an amendment to the first section. I can see no particular good in getting an agreement of that kind because that is the course which we would necessarily follow.

Mr. ALLISON. The Senator will see that there being sixty or seventy amendments unless we proceed reasonably in order it will take a long time. Of course a Senator can withhold his amendment until we get through with the reading of the bill for amendment, and amendments can be offered to the bill in the Senate. But my suggestion was for an orderly proceeding, not that I sought in any way to cut off anyone. That I know could not be done, and there is no disposition to do it.

Mr. ALDRICH. I have no objection to taking up the bill by sections, and disposing of as many amendments as possible from time to time, understanding all the time that any amend-

ment is in order to the bill, as it always has been under the practice of the Senate and as it is under the rule of the Senate, until the bill is finally passed to a third reading.

Mr. FRYE. An amendment is in order now. An amendment is in order any day and at any hour.

Mr. ALDRICH. I understand that. So when we talk about parliamentary practice and the rules of the Senate, they are not very orderly and never have been in the consideration of amendments.

Mr. TELLER. If the Senator who has this bill in charge will call it up after to-morrow and pursue the very course he suggested, we will, in my judgment, get through with it within the time which he has endeavored to have fixed for voting. Of course, there are unlimited opportunities here to offer amendments. After we get through all these amendments, somebody may offer another one, if he wants to. I have noticed in the Senate, however, that whenever that is done in a spirit of delay the amendment is pretty apt to go to the table without any further discussion or interference with the business. The Senate has it in its power all the time to hasten this matter, if it desires to do so. Nobody wants to cut off debate. Those who want to debate will have to-morrow and the next day. It seems to me that is time enough. I understand there are only two set speeches to be made. One can be made to-morrow and the other the next day. Then we can take up the bill under the ten or fifteen minute rule.

Mr. TILLMAN. We have not any agreement to any rule yet.

Mr. LODGE. It seems to me it is important that all Senators should have due notice of two things—when the final vote is to be taken and when the voting on amendments is to begin. I think there ought to be notice of those two facts.

Mr. TILLMAN. I have tried to get an opportunity to do that.

Mr. LODGE. I know the Senator has. I am entirely agreed with his original proposition.

Mr. TELLER. So am I.

Mr. TILLMAN. But the Senator from Alabama [Mr. MORGAN] has said that he will object to any request that a day be fixed for a final vote. Therefore that is settled. All I can do is to call on the Senate to take this matter under consideration and have it considered, and if Senators are not ready to talk, we have got to vote.

Mr. LODGE. I misunderstood the Senator from Alabama. I understood him only to object to fixing a time for a final vote without fixing a time for voting on the amendments.

Mr. TELLER and others. No.

Mr. LODGE. If he objects to a final vote, that ends it.

Mr. MORGAN. I am willing to name a day for taking up the amendments to this bill in the order of the sections, section by section. I am willing to go further and limit the time for debate upon amendments, if you please, to fifteen minutes, but I am not willing to fix a day for a final vote on this bill.

Mr. FRYE. Then why can not the Senator from South Carolina get an agreement that on Monday next the Senate will proceed to consider amendments to this bill in parliamentary order?

Mr. TILLMAN. It is too far off. I want a time sooner than that.

Mr. HALE. Why wait so long?

Mr. FRYE. Try Friday; under the fifteen-minute rule. Those two things can be settled, and we can leave the final vote to further determination.

Mr. HALE. Let me make a suggestion to my colleague. Why wait until Monday?

Mr. FRYE. I have no disposition to wait until Monday. If there is any way to get through with this rate bill, I want to get through with it.

Mr. HALE. Why not to-morrow or the next day?

Mr. TILLMAN. I have tried for unanimous consent and have not been able to obtain it. I now renew my notice that I shall try to get this bill up after the routine morning business and hold it before the Senate, and Senators will have to speak or vote.

Mr. HALE. That is right.

Mr. BAILEY. I believe the Senator from South Carolina can get an agreement that next Friday morning we shall take up this bill, to be read by sections; that as each section is read amendments to that section shall be in order, and that each amendment shall be subject to consideration under the fifteen-minute rule, and when considered shall be disposed of. I believe the Senator can get that.

Mr. FRYE. So do I.

Mr. TILLMAN. I will ask unanimous consent for that.

The VICE-PRESIDENT. The Secretary will report the request of the Senator from South Carolina for unanimous consent.

The Secretary read as follows:

It is agreed, by unanimous consent, that on Friday, May 4, 1906, immediately upon the conclusion of the routine morning business, the Senate will proceed to the consideration of the bill H. R. 12987, the bill to be read by sections for the purpose of amendment, the discussion upon amendments to proceed under the fifteen-minute rule——

Mr. TILLMAN. And amendments to be disposed of when the discussion closes.

The Secretary read as follows:

The amendments to be disposed of when the discussion thereon is concluded.

The VICE-PRESIDENT. Is there objection?

Mr. ALLISON. I do not object, but I want to understand the import of this proposition. I understand it to be that beginning Friday morning the debate upon this bill shall be limited to fifteen minutes.

Mr. TELLER. That is it.

The VICE-PRESIDENT. That is it.

Mr. ALLISON. That general debate shall close on Friday morning.

Mr. MORGAN. That is the effect of it.

Mr. TILLMAN. Thursday night.

The VICE-PRESIDENT. Is there objection to the request of the Senator from South Carolina? The Chair hears none.

Mr. MALLORY. There seems to be some difference of opinion as to when this shall begin. I should like to be advised on that point.

Mr. TILLMAN. It starts Friday morning immediately after the routine morning business.

The VICE-PRESIDENT. Friday morning at the conclusion of the routine morning business. Is there objection? The Chair hears none, and it is so ordered.

EXECUTIVE SESSION.

Mr. CARTER. I move that the Senate proceed to the consideration of executive business.

The motion was agreed to; and the Senate proceeded to the consideration of executive business. After one hour and twenty-three minutes spent in executive session the doors were reopened, and (at 6 o'clock p. m.) the Senate adjourned until to-morrow, Tuesday, May 1, 1906, at 12 o'clock meridian.

CONFIRMATION.

Executive nomination confirmed by the Senate April 30, 1906.

MARSHAL.

Milo D. Campbell, of Michigan, to be United States marshal for the eastern district of Michigan.

HOUSE OF REPRESENTATIVES.

MONDAY, *April 30, 1906.*

The House met at 12 o'clock noon.

Prayer by the Chaplain, Rev. HENRY N. COUDEN, D. D.

The Journal of the proceedings of yesterday was read and approved.

LEAVE OF ABSENCE.

Mr. MOORE, by unanimous consent, was granted leave of absence for ten days, on account of important business.

Mr. MILLER, by unanimous consent, was granted leave of absence for ten days, on account of important business.

APPOINTMENT OF MANAGERS FOR SOLDIERS' HOME.

Mr. HULL. Mr. Speaker, I ask unanimous consent for the present consideration of House joint resolution 145, for the appointment of members of Board of Managers of the National Home for Disabled Volunteer Soldiers.

The Clerk read the joint resolution, as follows:

Resolved, etc., That Charles M. Anderson, of Ohio; WILLIAM WARNER, of Missouri; Franklin Murphy, of New Jersey, and JAMES W. WADSWORTH, of New York, be, and the same hereby are, appointed as members of the Board of Managers of the National Home for Disabled Volunteer Soldiers of the United States; Charles M. Anderson, WILLIAM WARNER, and Franklin Murphy to succeed themselves, their terms of service expiring April 21, 1906; JAMES W. WADSWORTH to succeed Gen. Martin T. McMahon, deceased, whose term of office expires April 21, 1910.

The SPEAKER. Is there objection? [After a pause.] The Chair hears none.

The resolution was ordered to be engrossed and read a third time; and it was read the third time, and passed.

On motion of Mr. HULL, a motion to reconsider the last vote was laid on the table.

GEN. HORACE PORTER.

Mr. OLMSTED. Mr. Speaker, I ask unanimous consent for the present consideration of the joint resolution which I send to the Clerk's desk, extending the thanks of Congress to Gen. Horace Porter.